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1 UNITED STATES DISTRICT COURT
2 SOUTHERN DISTRICT OF NEW YORK

3 -----x
4 DONALD ROTH,
5 315 N. Righland Avenue
6 Nyack, NY 10960,

7 Petitioner,

8 v.

09 Civ. 8712 (GBD) (LMS)

9 HEARING

10 UNITED STATES OF AMERICA,

11 Respondent.
12 -----x

13 United States Courthouse
14 White Plains, N.Y.
15 May 9, 2013
16 10:30 a.m.

17 Before:

18 THE HONORABLE LISA MARGARET SMITH,

19 Magistrate Judge

20 APPEARANCES

21 CULLETON, MARINACCIO & FOGLIA
22 Attorneys for Petitioner
23 MICHAEL ANTHONY MARINACCIO

24 PREET BHARARA
25 United States Attorney for the
Southern District of New York
BENJAMIN ALLEE
Assistant United States Attorney

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1 THE DEPUTY CLERK: In the matter of Roth v. the United
2 States of America.

3 Counsel, please note your appearances for the record.

4 MR. ALLEE: Good morning, your Honor. Benjamin Allee
5 for the government.

6 THE COURT: Good morning, Mr. Allee.

7 MR. MARINACCIO: Good morning, your Honor. And for
8 the Petitioner, Mr. Roth, Michael Marinaccio.

9 THE COURT: Good morning, Mr. Marinaccio.

10 MR. MARINACCIO: Good morning.

11 THE COURT: We are here for an evidentiary hearing on
12 Mr. Roth's petition submitted before this Court.

13 Mr. Marinaccio was appointed by the Court for purposes
14 of representing Mr. Roth on what I believe to be a narrow issue
15 regarding allegations of Charles Melvin having potentially or
16 allegedly been promised certain benefits in connection with his
17 trial testimony which were not revealed to the defense at the
18 time.

19 I believe we have several witnesses available should
20 you wish to call them, Mr. Marinaccio.

21 Do you want to make a preliminary statement of any
22 sort?

23 MR. MARINACCIO: Yes, your Honor.

24 There are three witnesses before the Court -- or
25 waiting outside today that I anticipate calling on behalf of

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1 Mr. Roth; Special Agent Boss -- I think he's now a lieutenant
2 in the Newburgh Police Department -- Mr. Donald Campbell, and
3 also former AUSA, Mr. Colton, who tried the case.

4 The Court had indicated previously, at our conference
5 I believe on March 5th, that the issue of Judge Seibel's
6 subpoena would be held in abeyance pending what the Court hears
7 today.

8 Your Honor, as far as the narrow issues that we look
9 to go into, we are, of course, focusing in on the \$5,000
10 payment that I do not believe there will be any dispute was
11 actually paid to Mr. Melvin. I think the issue comes down to
12 when the discussions regarding that \$5,000 payment were first
13 entered into, whether the trial was still ongoing, and whether
14 or not the payment to Mr. Melvin should have been disclosed to
15 the defense even at a date after he had testified, but before
16 the trial had concluded.

17 It is going to be our argument in addition, your
18 Honor, that, having failed to advise the defense of this
19 additional payment or that this additional payment was in the
20 works while the trial was still going on deprived Mr. Roth's
21 counsel of an opportunity to recall witnesses on this issue to
22 determine whether or not -- what the circumstances surrounding
23 that payment were.

24 Also, your Honor, having reviewed now the transcript
25 of the trial, including the examination and particularly the

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1 examination of Mr. Boss and Mr. Melvin and the summations that
2 the government made at the conclusion of the case, the jury was
3 left with the impression that the only benefit that Mr. Melvin
4 could expect to receive was the 5K letter that's outlined in
5 his cooperation agreement when, in fact, if the paperwork is to
6 be believed on its face, discussions with Mr. Melvin had
7 occurred as early as perhaps January 26th, maybe even earlier
8 than that, and certainly as of February 1st, 2004, when
9 Mr. Melvin signed an application for public voucher for reward,
10 and it is our position, your Honor, that that information
11 should have been disclosed to the defense and, had it been
12 disclosed to the defense, there was ample time for an
13 application to be made to recall witnesses on this issue, and
14 failing to do that, it is our belief and our position that left
15 a misimpression with the jury that ultimately rendered its
16 verdict.

17 The problem is exacerbated, it seems to me, because
18 now Mr. Melvin is essentially unavailable to the Petitioner on
19 the basis of conversations that I had with his lawyer.

20 Is it Vita or D'Avita? I always confuse them.

21 THE COURT: James D'Avita?

22 MR. MARINACCIO: D'Avita. I apologize.

23 MR. ALLEE: Well, your Honor, in this instance, it's
24 Joe Vita.

25 THE COURT: Oh, Joe Vita. Two different ones.

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1 MR. MARINACCIO: Oh, it's Joe Vita.

2 THE COURT: Two different ones.

3 MR. MARINACCIO: That's why I always confuse the two,
4 Judge.

5 Mr. Vita, who is, unfortunately, not available and,
6 therefore, unable to speak for himself because he's on an ocean
7 liner somewhere on a cruise for vacation, but prior to him
8 leaving, he advised me in no uncertain terms that his client,
9 on his advice -- given his pending charges pending within the
10 Southern District, his client, on his advice, would invoke his
11 Fifth Amendment privilege against self-incrimination, a
12 privilege that we submit would not have been an issue back in
13 2003, 2004 had this information been promptly disclosed.

14 I have had some discussions, your Honor, with the
15 government regarding the scope of the privilege, and it was my
16 intention, if Mr. Melvin were to take the witness stand, not to
17 ask him any questions about any of his prior bad acts, not ask
18 him any question about his pending charges. The Court made it
19 very clear the last time we were here, it seems to me, that the
20 Court has available to it the full trial transcript, can read
21 all about Mr. Melvin and his prior bad acts, and, therefore, I
22 have taken the position that the invocation of the Fifth
23 Amendment privilege is not required here because, number one,
24 Mr. Melvin was not asked any questions about this \$5,000
25 payment at the trial. He wasn't even asked any questions about

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1 subsistence payments for which the defense got notice. So,
2 therefore, there is no possibility -- even if you get around
3 the statute of limitations, there's no possibility that there
4 would be any exposure for him.

5 But regardless of my explanation of that to Mr. Vita,
6 he indicated that it is his position that his client would
7 invoke the Fifth. I expect, your Honor, that his position
8 would not change given the fact that, more recently,
9 apparently, the government has superseded their indictment
10 against Mr. Melvin to add additional charges. And I believe
11 Judge Karas has set a second trial date for July 8th. So he
12 has a trial date right now for May 20th, meaning Mr. Melvin,
13 before Judge Karas, and I believe a second trial date for July
14 8th. How that works out, I don't know. I'm not involved in
15 that at all. But I expect that Mr. Vita's position would not
16 be changed in view of those changed developments.

17 That is my preliminary statement.

18 THE COURT: Okay. Thank you, Mr. Marinaccio.

19 Mr. Allee, do you wish to make any introductory
20 remarks?

21 MR. ALLEE: Well, your Honor, yes. I would like to
22 just address what Mr. Marinaccio said.

23 I disagree with how he's characterized this hearing.
24 As the Court has described, this is a narrow hearing. The
25 issue centers on this payment of \$5,000 to Charles Melvin which

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1 was made to him about slightly less than two months after he
2 testified in the trial of Donald Roth. We're here because
3 Donald Roth challenges his conviction at trial on the ground
4 that allegedly the government suppressed favorable evidence to
5 him, impeachment material, and that the alleged suppression of
6 that impeachment material was material, would put the case in a
7 different light so as to undermine confidence in the verdict.

8 The factual disputes are the reason we're having this
9 hearing, and your Honor, as I understand it, has ordered it in
10 order to resolve the factual dispute about the timing of the
11 payment and sort of who knew what when among law enforcement
12 and among Charles Melvin. That does not mean that the scope of
13 the hearing would include things like the summations of the
14 parties or inquiry into those types of things.

15 I am elaborating on this concern I have because I've
16 been handed just moments before you walked out what are marked
17 as 17 exhibits that are potential exhibits for Mr. Roth. Many
18 of them appear to be just excerpts of transcripts from the
19 trial back in '03 and '04. And I've had an opportunity to read
20 the first two of those trial excerpts. They include, however,
21 additionally, the Attorney General's guidelines regarding the
22 use of confidential informants, which is marked as an exhibit,
23 a possible exhibit, and then a memorandum from 2010 about
24 guidance for prosecutors regarding criminal discovery. It's
25 hard for me to imagine how this hearing could have a scope that

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1 those would be relevant exhibits here, and I'm concerned about
2 that.

3 Somewhat relatedly, I have a point to make about the
4 procedure we're using here, your Honor. It is the plaintiff's
5 burden of proof in a habeas --

6 THE COURT: Petitioner's burden. Petitioner's, not
7 plaintiff's.

8 MR. ALLEE: Pardon me, your Honor. Petitioner's.
9 I've gotten that all backwards. I tried to sit at the wrong
10 table this morning.

11 It is the Petitioner's, Mr. Roth's, burden of proof
12 here, as we all know. That came up at a conference, the most
13 recent conference here, and your Honor ordered -- as I
14 understand it, your Honor ordered the government to call
15 witnesses notwithstanding that that's the evidentiary burden,
16 and so we prepared -- pursuant to that order, we prepared that
17 way. And I'm prepared to call Special Agent Boss and former
18 AUSA Glenn Colton, who are outside this courtroom. They
19 appeared -- well, firstly, I asked them to appear, and they
20 did. I also understand that they have also received subpoenas
21 from the Petitioner.

22 Mr. Marinaccio tells me he would like to call those
23 witnesses. I don't really have a strong view about that, your
24 Honor. I just want to point out that, to prepare today, I
25 never got any of these documents that may be shown to these

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1 witnesses that may be relevant or not, and they have been
2 prepared to be directed by the government pursuant to what I
3 understood the Court to order. Again, however the Court wants
4 to proceed is fine with me, but that's how we prepared for
5 today, and that didn't include -- that was without the benefit
6 of these exhibits or Mr. Marinaccio's view that he wants to
7 call them as witnesses.

8 THE COURT: Let me just say, with regard to the
9 transcript of the proceeding below, having not given it any
10 deep thought, my initial response is that the Court, in order
11 to make any assessment of materiality, has to consider and be
12 familiar with that trial transcript. And it is a part of the
13 Court record with regard to the petition, so it is before the
14 Court. But my view of that is that it goes to the question of
15 materiality and whether there was anything withheld that the
16 Court may determine would have been likely to have changed the
17 verdict. In order to make that assessment, the Court has to be
18 familiar with the transcript below. But the transcript is what
19 the transcript is. It's not subject to argument or discussion
20 about what happened at trial.

21 MR. ALLEE: And your Honor, maybe I can just put
22 what -- I don't mean to be cryptic. I have a concern from the
23 outset of this proceeding that it will be a fishing expedition,
24 that subpoenas have gone out to all kinds of people, and that
25 there will be efforts to broaden this beyond what is necessary

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1 based on what the Court has ordered.

2 The Court ordered us to put on witnesses. The Court
3 described the narrow issue at the hearing. We did that. I now
4 fear what -- I now am concerned what is actually going to
5 happen is there's a bunch of testimony that these witnesses
6 haven't thought about for nine years that they're going to be
7 asked about from the Petitioner and that this will turn into
8 this sort of fishing expedition with ambush hooks, you know,
9 throughout that I have feared to begin with. This is not what
10 I expected this hearing to be. If there are relevant
11 questions, ask them. If the plaintiff wants to call the
12 witnesses, that's all fine. But I am starting to see the
13 beginnings of what I was concerned this hearing would become
14 and anticipate a lot of objections to relevance if all these
15 are being offered on sort of collateral or tangential detours
16 by the Petitioner here.

17 THE COURT: Well, the first thing that I want to say
18 is, because we're proceeding without a jury, I may be somewhat
19 more amenable to broader questions, but, as I made clear
20 previously, I don't care if Mr. Melvin was treated or handled
21 differently from every other informant ever used by any
22 government attorney. That's not an issue. I don't care. It's
23 not an equal protection issue.

24 To the degree that there may be any questions with
25 regard to whether he was handled in a way that's contrary to

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1 any government guidelines, there may be some relevance there,
2 but that is really dependent on what the various government
3 agents, either law enforcement agents or prosecutors, knew and
4 when they knew it, and we can only find that out by asking
5 them.

6 My intention is to focus on the issue of the payment,
7 on the issue of discussions with Mr. Melvin or in Mr. Melvin's
8 presence, and the process by which that payment was made. And
9 I didn't hear anything different from that from Mr. Marinaccio.
10 I thought that's actually what I heard from Mr. Marinaccio.

11 MR. MARINACCIO: Yes, Judge.

12 Just so that the record is clear -- and, you know,
13 again, I am mindful of the fact that we're here without a jury,
14 you know. I trust the Court to be able to filter the
15 information that's coming. I mean, basically, the excerpts of
16 the transcript, as the Court correctly points out, the
17 transcript is the transcript. The excerpts relate to the
18 cooperation agreement and the testimony regarding the
19 cooperation agreement and the benefit that was presented to the
20 jury as to -- withdrawn -- as to what Mr. Melvin could expect
21 as far as a benefit as a result of his cooperation. We have
22 that.

23 We have the guidelines, meaning the government
24 guidelines deal with the obligations of the prosecution team
25 vis-a-vis discovery and payments.

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1 Also included in the exhibits are evidence of payments
2 that were made, that were disclosed to the defense, in the form
3 of what's referred to as ATF subsistence payments,
4 approximately \$11,300 and change. That, in fact, was revealed
5 to the defense for them to make the determination as to whether
6 or not they wanted to use it or not in this particular case at
7 the trial. It doesn't appear, from what I've read of the
8 transcript, that it was utilized, but the option was provided
9 for the defense attorneys to make that determination.

10 When it comes to the \$5,000 payment, though, I don't
11 think there's any dispute that it was never revealed to the
12 defense. And part of the argument is that, you know, now that
13 we have the voucher for reward, now that we have it, we can
14 certainly make the argument and the Court can certainly
15 consider that it was -- number one, we can ask about the
16 circumstances of it, but, number two, that it was certainly
17 discussed and paperwork generated in sufficient time for them
18 to have made this revelation to the defense for their use as
19 they saw fit.

20 And this trial, your Honor, did not conclude with a
21 verdict, if my memory serves me, until February 12th of 2004.
22 On January 26th, 2004, which is the first date that we have on
23 this voucher, this trial was still going. As a matter of fact,
24 the defense was on the defense case at that point. And when
25 Mr. Miller signed it on February 1st -- Mr. Melvin, rather,

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1 signed it on February 1st, the case was still -- there was
2 still testimony being taken. And on February 9th, another date
3 that we have here, I believe summations had commenced. The
4 only thing that happened after, based upon the dates that are
5 on this document, after the trial was concluded, was the
6 payment actually being made. And I think that the Court can
7 consider it and should consider that timing in deciding the
8 petition.

9 I'm mindful, Judge, of the limitations that the Court
10 placed upon us. I've said that in a very long-winded way. I'm
11 mindful of the fact that we're focusing in on the \$5,000.

12 THE COURT: I do think we need to go ahead and move
13 forward. I know that we had had a discussion about who should
14 call witnesses. I will admit my own notes are not as thorough
15 on this issue as I might have liked. I know that I had
16 directed the government to produce witnesses.

17 If I told you, Mr. Allee, that I was going to have you
18 go first, I've changed my mind. And I do think that the burden
19 is on the Petitioner. To the degree that witnesses have been
20 made available, we should go forward and hear what they have to
21 say.

22 As previously noted by Mr. Marinaccio, I've withheld a
23 decision with regard to whether to require Judge Seibel to
24 testify. I believe I've told the parties that she's willing to
25 appear to testify on the matter to the best of her ability,

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1 but, after consultation with Judge Daniels, who is the assigned
2 District Judge in the matter, I'm going to hold off on making
3 that decision until I determine whether there's any open
4 factual issue which she would be able to shed light on.

5 So that having been said, do I understand, Mr. Allee,
6 that we have Mr. Boss, Mr. Campbell and Mr. Colton available?

7 MR. ALLEE: They are outside the courtroom, your
8 Honor, yes.

9 THE COURT: Very good. Thank you.

10 Mr. Marinaccio, who do you want to hear from?

11 MR. MARINACCIO: I want to hear from Mr. -- well,
12 Agent Boss initially.

13 THE COURT: All right.

14 Mr. Plant, would you go get him.

15 MR. ALLEE: I can do that.

16 THE COURT: Thank you, Mr. Allee.

17 ANDREW BOSS,

18 called as a witness by the Defense,

19 having been duly sworn, testified as follows:

20 THE DEPUTY CLERK: Please have a seat and state your
21 name for the record. State and spell your name for the record.

22 THE WITNESS: Andrew Boss. A-N-D-R-E-W. Last name
23 B-O-S-S.

24 THE COURT: You may proceed, Mr. Marinaccio.

25 MR. MARINACCIO: Thank you, your Honor.

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Boss - Direct

1 DIRECT EXAMINATION

2 BY MR. MARINACCIO:

3 Q. Agent Boss, good morning.

4 A. Morning.

5 Q. How are you?

6 A. Great. How are you?

7 Q. We have never spoken before today, correct?

8 A. No. Just briefly in the hallway.

9 Q. Agent Boss, just tell us how you are currently employed.

10 A. Special agent with Bureau of Alcohol, Tobacco, Firearms and
11 Explosives.

12 Q. And how long have you been so employed?

13 A. Since July of 1998.

14 Q. And you were involved, were you not, in the investigation
15 and prosecution of Mr. Donald Roth and Mr. St. John, correct?

16 A. Yes.

17 Q. And in connection with that investigation and others, you
18 had contact with an informant by the name of Charles Flip
19 Melvin; is that correct?

20 A. Correct.

21 Q. Okay. Were you the handling agent for Mr. Melvin?

22 A. Yes.

23 Q. And what exactly does that entail, being the handling agent
24 for Mr. Melvin?

25 A. You maintain contact, handle any paperwork related to the

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Boss - Direct

1 informant, money, generally wiring up if you're doing
2 undercover-type deals, handling evidence.

3 Q. And in connection with your handling of Mr. Melvin, during
4 the course of his cooperation, were subsistence payments made
5 to him from the Alcohol, Tobacco and Firearms Bureau?

6 A. Yes.

7 Q. Do you recall approximately how much money in subsistence
8 payments were made?

9 A. Subsistence itself, somewhere around -- well, depends on
10 the time frame.

11 Q. Okay.

12 MR. MARINACCIO: May I have just a moment, your Honor?

13 THE COURT: Sure.

14 (Pause)

15 MR. MARINACCIO: Your Honor, I would like to show the
16 witness what I have premarked as Petitioner's Exhibit 11. And
17 I have a copy for the Court. I may have provided a marked-up
18 copy to somebody. Or perhaps not.

19 A. There's writing on the bottom of this one. Is that your
20 handwriting?

21 Q. No.

22 Is there any yellow markings on it?

23 A. No.

24 Q. If there's no yellow markings, then we're okay.

25 A. No.

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1 Q. Okay.

2 Do you recognize what has been marked as Petitioner's
3 Exhibit 11?

4 A. Yes.

5 Q. What do you recognize it to be?

6 A. Want me to go page by page?

7 Q. Just focusing on the first two pages.

8 A. That is like a word document, like a summary sheet, for
9 subsistence paid to Charles Melvin.

10 Q. And what period of time does it cover?

11 A. Looks like early '02, March '02, through October '03.

12 Q. Okay. And do you recall whether or not this document was
13 provided to Mr. Roth's attorneys during the course of
14 discovery?

15 A. I don't know if it was.

16 MR. ALLEE: Objection. Foundation.

17 THE COURT: Overruled.

18 Q. You don't recall?

19 A. I know this was -- I saw this during the trial, but I don't
20 know who gave anything to who, no.

21 MR. MARINACCIO: Your Honor, I offer it into evidence,
22 Petitioner's Exhibit 11.

23 MR. ALLEE: No objection.

24 THE COURT: The entire thing?

25 MR. MARINACCIO: Yes, Judge, the entire thing.

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1 THE COURT: Well, what I've heard is a description of
2 the first two pages, so I think I need more of a description of
3 the rest before I can receive it.

4 MR. MARINACCIO: Very well, Judge.

5 THE COURT: Let me inquire.

6 Mr. Boss, do you know what the marking at the bottom
7 right which starts with the numbers 3502, do you know what that
8 means?

9 THE WITNESS: It's just the 3500 material. I don't
10 know who put it there.

11 THE COURT: And 3500 material would have been produced
12 by the government to defense counsel; is that right?

13 THE WITNESS: That's usually the way it works, yes.

14 THE COURT: Go ahead, Mr. Marinaccio. You can ask
15 with regard to the pages beyond the first two.

16 MR. MARINACCIO: Beyond the first two. Thank you,
17 your Honor.

18 Q. Page three, what do you recognize that page to be, if at
19 all?

20 A. I've seen these pages before. This is -- these forms are
21 done by the U.S. Attorney's Office.

22 Q. Did you see this form, this particular form?

23 A. I can't particularly say I saw this particular form.

24 Q. Do you recognize that form? Have you seen that form in the
25 past? Not this particular one, but a form similar to it.

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1 A. Yes.

2 Q. What's the purpose of that form, if you know?

3 A. It's for the victim witness coordinator of the courthouse,
4 or Southern District U.S. Attorney's Office, to provide money
5 to cooperating a witness victim.

6 Q. And do you know if this particular form relates to Charles
7 Melvin?

8 A. Reading it, yeah. It says it does.

9 Q. Okay. Moving on to the next page, which is redacted, the
10 third page -- the next page after that, which is redacted, did
11 you ever see those pages in connection with the third page of
12 the document before?

13 A. Yes.

14 Q. Is it part of the third page which has the markings 3502-U,
15 those two redacted pages?

16 A. I don't know if they're part of the same form, but it's --
17 it's part of the process, yeah.

18 Q. How about the part of the document that's marked as 3502-V?

19 A. This is the one I'm talking about that I saw before, yeah,
20 V.

21 Q. You saw that one before as well?

22 A. Yes.

23 Q. Okay. And how about the next page after that that's marked
24 3502-W?

25 A. Yes.

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Boss - Direct

1 Q. You saw that before?

2 A. Yes.

3 Q. And 3502-X?

4 A. Can't say that I remember this one.

5 Q. And what about the final page?

6 A. I have two more after that.

7 Q. You have two more after that?

8 A. I have a declination form that's not marked with any 3500,
9 and then I have another copy of 3502-U.

10 Q. Is that a duplicate copy of the --

11 A. The first page? Probably. Yeah. I have two 3502-Us.

12 MR. MARINACCIO: Your Honor, I'll offer just the first
13 two pages of this document into evidence.

14 THE COURT: Okay. Just the first two pages. 3502-Z
15 is how the first page is marked, and then the second one
16 appears to be a continuation. Is that right?

17 MR. MARINACCIO: That's correct.

18 THE COURT: All right. So we're going to keep that as
19 Plaintiff's 11-A. Sorry, not plaintiff, Petitioner. So I'm
20 going to make that 11-A. And there being no objection from the
21 government, 11-A is received.

22 (Petitioner's Exhibit 11-A received in evidence)

23 THE COURT: I don't mean to interrupt, Mr. Marinaccio,
24 but, Mr. Boss, just for my edification, the two documents that
25 are marked 3502-V and W, is that your signature on the bottom

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1 right on those two documents?

2 THE WITNESS: V, yes. W, yes.

3 THE COURT: Okay. Thanks.

4 Go ahead, Mr. Marinaccio.

5 MR. ALLEE: Your Honor, I'm sorry to interrupt, but I
6 just want to maybe, for the record, clarify.

7 These are documents submitted also with the
8 government's brief as Exhibit F, and so, while they're not
9 properly offered through Agent Boss, we have no objection to
10 authenticity or to the Court's consideration of them.

11 THE COURT: The remainder of 11?

12 MR. ALLEE: Yes, your Honor. I would have voir dire.
13 This is not the right witness. But my point is --

14 THE COURT: If you're conceding that they're
15 admissible, we'll just receive them. That's fine.

16 MR. ALLEE: We're happy for the Court to consider
17 them. We're not disputing their authenticity. There are
18 problems with asking Agent Boss about them.

19 THE COURT: All right. Well, let's consider the rest
20 of the documents as Petitioner's 11-B. So 11-A Mr. Boss has
21 been able to identify. 11-B I will receive, but it may be that
22 inquiry will have to be through someone else, though he did
23 identify that it's his signature on 3502-V and 3502-W.

24 Go ahead, Mr. Marinaccio.

25 MR. MARINACCIO: Thank you, your Honor.

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Boss - Direct

1 (Petitioner's Exhibit 11-B received in evidence)

2 Q. Now, Agent Boss, I'm sorry, the payments that are reflected
3 on Petitioner's 11-A, the last payment appears to have been
4 made on December 1st, 2003; is that correct?

5 A. I have October 1st.

6 Q. October 1st. I am sorry. You're correct. October 1st,
7 2003.

8 A. Yes.

9 Q. Do you recall now whether that was before or after the
10 trial of Mr. Donald Roth commenced?

11 A. I believe that was before.

12 Q. Now, other than the payments -- withdrawn.

13 Did you have any role to play in determining whether
14 or not these payments that were made to Mr. Melvin, these
15 subsistence payments that are reflected here that were made to
16 Mr. Melvin, actually went for subsistence payments or were used
17 for some other purpose by Mr. Melvin?

18 A. Like do I know exactly what he did with it?

19 Q. Correct.

20 A. Some of it, I know he paid his rent with, cell phone bill.

21 Q. Did you request any documentation from him to confirm that
22 he was actually using these payments to pay for phone bills and
23 rent and things of that nature?

24 MR. ALLEE: Objection. Relevance.

25 THE COURT: I'm going to allow it, but we're not going

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1 to go very deeply into this, Mr. Marinaccio.

2 MR. MARINACCIO: I'm not going to go very deeply into
3 it.

4 THE COURT: You may answer the question, Mr. Boss.

5 A. No.

6 Q. And how did these payments come about? Did he just request
7 them and then you paid them or did you volunteer to give them?
8 How did he come about getting these payments? Do you know?

9 A. Both. It could have been needing money for rent, a phone
10 bill was due, electrical. Could have requested. Could have
11 paid for the -- gave him the money to put more minutes on his
12 boost phone, something like that.

13 Q. And are you the person that he would ask for these payments
14 from time to time?

15 A. Yes.

16 Q. And other than the documentation that is contained in
17 Petitioner's Exhibit 11-A and Petitioner's Exhibit 11-B, are
18 you aware of any other documentation that was generated in
19 connection with these payments?

20 A. Yeah. All of these payments, they would have requests of
21 the funds, return of the funds. We have the paperwork related
22 to the other stuff. But it's a request receipt and return,
23 basically. It's government forms.

24 THE COURT: When you say these payments, are you
25 referring to the ones that are identified on the list in

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1 Petitioner's 11-A?

2 THE WITNESS: Yes.

3 THE COURT: Okay.

4 Q. Now, other than the payments that are reflected on
5 Petitioner's 11-A, was Mr. Melvin provided with any other
6 monies that you're aware of?

7 A. 11-A?

8 Q. Other than 11-A.

9 A. Yes.

10 Q. Okay. Was he also presented at some point with a \$5,000
11 payment?

12 A. Yes.

13 MR. MARINACCIO: Your Honor, I would like to show the
14 witness what I have marked as Petitioner's Exhibit 1. And I
15 have a copy for the Court as well.

16 Q. Agent Boss, have you had the opportunity to take a look at
17 what has been marked as Petitioner's Exhibit 1?

18 A. Yes.

19 Q. Do you recognize that document?

20 A. Yes.

21 Q. What do you recognize that document to be?

22 A. Would you like me to go page by page? They're separate
23 forms.

24 Q. Okay. How about the first page?

25 A. First page is Treasury Department application for public

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1 voucher for reward.

2 Q. What about the second page?

3 A. That, again, is under the Department of the Treasury. It's
4 a request for the advance of funds. So that's requesting
5 money.

6 Q. I want to make sure that we're looking at the same second
7 page.

8 A. The top says request for advance of funds.

9 Q. Your second page is not justification for payment?

10 A. Oh, sorry. Second page. Sorry, yes. Justification for
11 payment continued.

12 Q. So is the second page part of the first page?

13 A. Yes. Same form.

14 Q. All right. Now moving on to the third page of the
15 document.

16 A. That's the request for advance of funds.

17 Q. Okay. And the fourth page?

18 A. This is the report of expenditure for the funds requested.

19 Q. And is the fourth page part of the third page or are they
20 separate?

21 A. Separate.

22 Q. And how about the fourth page? The last page, rather? I'm
23 sorry.

24 A. It's a receipt, payment receipt for investigative expense,
25 information and/or Treasury check.

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1 Q. Now, have you seen these documents before?

2 A. Yes.

3 Q. And are these the documents that reflect a payment of
4 \$5,000 to Mr. Melvin?

5 A. Yes.

6 MR. MARINACCIO: Your Honor, I offer the entirety of
7 what I've marked as Petitioner's Exhibit 1 into evidence.

8 MR. ALLEE: No objection.

9 THE COURT: Petitioner's 1 is received. It's a
10 five-page document.

11 (Petitioner's Exhibit 1 received in evidence)

12 Q. Now, Agent Boss, did you have a role to play in preparing
13 the documents that are part of Petitioner's Exhibit 1?

14 A. Yes.

15 Q. And taking a look at the first section at the top of the
16 first page, where it begins, "I, Charles Melvin," and you see
17 there's a date a couple of lines down, 26th day of January,
18 2004?

19 A. Yes.

20 Q. Okay. Did you type that date in or have that date typed
21 in?

22 A. No.

23 Q. Okay. Do you know what significance that date has?

24 MR. ALLEE: Objection.

25 THE COURT: Overruled.

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1 A. No.

2 Q. Was the trial of Mr. Roth still ongoing on January 26th,
3 2004, if you recollect?

4 MR. ALLEE: Objection. Relevance.

5 THE COURT: Overruled.

6 A. It was.

7 Q. And then below that paragraph, there is a typed-in name,
8 Charles Melvin, a signature, and then a date, 2-1-04.

9 A. Yes.

10 Q. Is that Charles Melvin's signature?

11 A. Yes.

12 Q. And were you present when Charles Melvin signed that
13 document on 2-1-04?

14 A. I -- I don't think so. I don't remember.

15 Q. Now, did you have discussions with Mr. Melvin regarding
16 this \$5,000 payment?

17 A. Yes.

18 Q. Did he request the \$5,000 payment?

19 A. The specific amount?

20 Q. Yes.

21 A. I don't believe he requested a specific amount.

22 Q. Do you recall what the circumstances were surrounding the
23 generation of this particular paperwork?

24 Do you understand my question?

25 A. No, not really.

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1 Q. How did it come about that you were preparing these
2 documents or that these documents were being prepared?

3 A. The background?

4 Q. Yes.

5 A. I had talked to him on the phone. It was sometime early in
6 the year. And we were talking about how he was either not
7 allowed to live at his mother's anymore in Virginia or he got
8 kicked out or something to that effect, and he was down on his
9 luck, and he was asking for money.

10 Q. When you say sometime early in the year, are you talking
11 about early in 2004?

12 A. Yes.

13 Q. While the trial of Mr. Roth was still ongoing?

14 A. Yes.

15 MR. ALLEE: Objection. I just object to questions
16 about whether the trial was ongoing. I don't have to do it
17 every time, your Honor, but --

18 THE COURT: You can have a continuing objection. I'm
19 overruling it.

20 MR. ALLEE: Thank you, your Honor.

21 Q. Other than Petitioner's Exhibit 1, do you have any other --
22 withdrawn.

23 Other than Petitioner's Exhibit 1, have you seen any
24 other document relating to the payment of \$5,000 to Mr. Melvin?

25 A. The whole thing? No.

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1 Q. When Mr. Melvin called you sometime early in 2004, did you
2 prepare any notes or documentation concerning that
3 conversation?

4 A. No.

5 Q. No investigative reports? No handwritten notes? Nothing?

6 A. No.

7 Q. What was the next step that you took after Mr. Melvin
8 called you to tell you he was down on his luck and he needed
9 some money?

10 A. I got with my boss at the time -- he was an acting boss,
11 John McKenna -- and asked him what we could do.

12 Q. And what did Agent McKenna tell you?

13 A. He told me part of what I already knew is we could not give
14 him any more money if he wasn't working for us
15 subsistence-wise. We couldn't just give him money for --
16 because he needed it. He was done cooperating. But an option
17 was we could give him a reward for all the prior work that he
18 had done.

19 Q. Now --

20 THE COURT: I'm sorry, Mr. Marinaccio, I do think I
21 need to interrupt you just briefly.

22 With regard to Petitioner's Exhibit 1, in accordance
23 with my previous instructions to the government, they have
24 produced to me the unredacted version of all five pages from
25 Petitioner's Exhibit 1, and I'm satisfied that there's nothing

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1 in the redactions which would impact on Mr. Roth's ability to
2 pursue this question and that there's no need for you to have
3 the unredacted version.

4 MR. MARINACCIO: Fine, Judge.

5 And just to complete the record, I was provided with
6 this copy that I've marked as Petitioner's 1 from the
7 government following the Court's determination regarding the
8 redaction.

9 Q. Now, in the body of the document -- going down in the body
10 of the document, first page, after Charles Melvin's signature,
11 there's an explanation regarding why this particular payment is
12 justified; is that correct?

13 A. Yes.

14 Q. And there's no mention in that particular paragraph there
15 concerning Mr. Melvin's need for any monies to pay for living
16 expenses or things of that nature, correct?

17 A. No, correct.

18 Q. And I see that you took a look both at the first and the
19 second page; is that correct?

20 A. Yes.

21 Q. So there's absolutely no record in this particular
22 document, those first two pages, of any request by Mr. Melvin
23 for help with living expenses?

24 A. Correct.

25 Q. The only thing that's mentioned there is the work that he

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1 did in connection as a confidential informant in connection
2 with the prosecution or the investigation and prosecution of
3 various individuals, correct?

4 A. Yes.

5 Q. And on the first page, it indicates that there are 11
6 defendants that he helped with, correct?

7 A. Correct.

8 Q. Now, did those 11 include Mr. Roth and Mr. St. John?

9 A. I believe this paragraph is referring to the defendants
10 prior to the initiation of the investigation with Mr. Roth and
11 St. John.

12 Q. And the second page, the explanation there, that deals with
13 Mr. St. John and Mr. Roth, correct?

14 A. Yes.

15 Q. And then if you look in that last paragraph, it now talks
16 about 13 defendants to date, correct?

17 A. Correct.

18 Q. And it talks about, in the last line, the investigation of
19 and conviction of the defendants were a direct result of his
20 efforts, meaning Mr. Melvin's efforts, correct?

21 A. Correct.

22 Q. Mr. Roth and Mr. St. John had not yet been convicted,
23 correct?

24 A. Right.

25 Q. Would the fact that now you're talking about 13 defendants

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1 in that last paragraph as opposed to the 11 that you talked
2 about on the first page, would those additional two then
3 include Mr. Roth and Mr. St. John?

4 A. I don't believe so.

5 Q. You don't believe so?

6 Do you know who the two additional defendants may have
7 been?

8 A. There was plenty of defendants he had helped arrest. We
9 didn't prosecute everybody on the federal end. Could have been
10 two state defendants. Could be a typo.

11 Q. But you don't know as you sit here right now?

12 A. No.

13 Q. And that last paragraph talks about assistance to the ATF
14 and the United States Attorney's Office, correct?

15 A. Yes.

16 Q. And that he provided testimony in Federal Court as needed,
17 correct?

18 A. Yes.

19 Q. Doesn't mention anything about state court?

20 A. It does not, no.

21 Q. Okay. And the final line there is it's recommended that
22 there be a reward to Mr. Melvin, correct?

23 A. Yes.

24 Q. Now, who prepared this write-up, this summary that's in the
25 first two pages of the document?

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1 A. I did -- I'm not sure how I did, but I did the write-up and
2 provided the substance of the paragraphs, but my acting
3 supervisor prepared the form. I was on trial.

4 Q. You were in court every day on the Roth and St. John
5 matter, correct?

6 A. Yeah. I don't believe we had laptops at that point,
7 either, so it wasn't --

8 Q. It wasn't that long ago.

9 A. I worked for the government.

10 THE COURT: He works for the government.

11 A. No laptops nine years ago.

12 THE COURT: Unlikely.

13 Q. Well, I didn't have a laptop, either, then.

14 Anyway, my point is do you know when it was that you
15 prepared the write-up that ultimately was transferred onto this
16 form?

17 A. Not specifically, no.

18 Q. Now, on going back to the first page, on the bottom,
19 there's a place for a signature on that first line. Is that
20 your signature?

21 A. No.

22 Q. Whose signature is that?

23 A. I can't tell whose signature that is. Somebody signed it
24 for me.

25 Q. Did they sign it for you with your permission?

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Boss - Direct

1 A. Yes.

2 Q. Do you know who it was that may have signed it for you?

3 A. I can't make it out, no.

4 Q. And that was done, as far as you know, on February 9th,
5 2004?

6 A. That's what it says, yes.

7 Q. And you weren't able to sign that because you were in court
8 on trial?

9 A. The trial ended around this time, but I wasn't around to
10 sign it, right.

11 Q. Now, who came up with the amount of \$5,000?

12 A. That -- I believe it was between myself and my boss, John
13 McKenna, like how much could we reasonably give him as a reward
14 considering the work that was done.

15 Q. So it had nothing to do with what Mr. Melvin said he needed
16 to help him out with his living expenses?

17 A. That was a consideration, yeah.

18 Q. Did he show you any bills or any backup for why he may have
19 needed this money?

20 A. I don't remember if he did or didn't.

21 Q. And you wrote this up as a reward?

22 A. Yes.

23 Q. But your testimony is that Mr. Melvin had requested some
24 assistance for living expenses?

25 A. Yes.

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1 Q. And this was a way for you to get around the fact that you
2 would not be able to give him any money because he was no
3 longer actively participating, correct?

4 MR. ALLEE: Objection.

5 THE COURT: Sustained. Rephrase it.

6 Q. Well, let's go to the third page.

7 Did you fill out those boxes that are on the third
8 page of the where it says informant subsistence and then other
9 with the parentheses explain? Did you check off those boxes?

10 A. I'm not sure if I did the top. I can't say for sure if I
11 actually filled out the top part. I probably did, but I'm not
12 sure.

13 Q. Now, there's a section, then, underneath that that calls
14 for an explanation and justification, and, there, there is an
15 explanation. And it makes no mention, does it, of any request
16 by Mr. Melvin for subsistence assistance, correct?

17 A. Correct.

18 Q. The explanation deals solely with a reward?

19 A. Yes.

20 Q. And then there's a place on the bottom there for signature
21 under the date February 20th, 2004. Is that your signature
22 next to your name, Andrew M. Boss?

23 A. Yes.

24 Q. That is your signature?

25 A. Yes.

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1 Q. And there is a figure to the right of total funds expended
2 in this case to date, \$2,582.72. What was that figure? What
3 did that represent?

4 A. That was money expended on this case to date, to that date.

5 Q. Was that monies that were expended for Mr. Melvin or monies
6 that were expended for routine investigative expenses?

7 A. Probably both.

8 Q. Is part of that \$2,582.72 reflected in what was marked as
9 Petitioner's Exhibit 11-A?

10 A. Yeah. Should be. If any of this was subsistence. If this
11 was the subsistence, yeah, it would be reflected here.

12 Q. You we can't tell just from looking at this document?

13 A. No, I cannot.

14 Q. So that additional money could have been an additional
15 reward that was paid, correct --

16 MR. ALLEE: Objection.

17 Q. -- to Mr. Melvin?

18 THE COURT: Sustained.

19 Let me ask you, Mr. Boss, to look back at Petitioner's
20 2-A. On the second page of 2-A -- sorry, 11-A, I'm sorry,
21 11-A, on the second page of 11-A, under the date 10-24-02, it
22 says \$3,000, relocation expense, correct?

23 A. Correct.

24 THE COURT: And so, quite clearly, the amount of money
25 identified on the list that makes up Plaintiff's 11-A is not

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1 reflected in the \$2,582.72 on the third page of Petitioner's 1;
2 is that right?

3 THE WITNESS: Um.

4 THE COURT: Couldn't be.

5 THE WITNESS: Well, right, couldn't be, but say -- I'm
6 just saying, just for clarification, say in 10-1-03, if he --
7 he may have been paid subsistence out of like a different case.
8 But it probably isn't. Because now I remember correctly we
9 didn't open this case until after this takedown. We had a big
10 sweep in Newburgh, and that happened in end of October of '0 --
11 it might have been '02.

12 THE COURT: So the subsistence payments that are
13 identified on Petitioner's 11-A would not necessarily have come
14 under this case number. It could have come under any of the
15 other case numbers that, for example, are on the first page of
16 Petitioner's 1, but which I've allowed to have redacted --

17 THE WITNESS: Yes.

18 THE COURT: -- with regard to other defendants that
19 Mr. Melvin participated in the investigation and prosecution
20 of.

21 THE WITNESS: Yes. There was approximately like five
22 separate investigation numbers we used over -- when we were
23 using Mr. Melvin.

24 THE COURT: So if, in fact, we had the various
25 additional documents that you referenced earlier relating to

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1 the subsistence payments on Petitioner's 11-A, each of those
2 payments would reflect separately which case number that
3 subsistence was related to.

4 THE WITNESS: Correct.

5 THE COURT: Am I getting it?

6 THE WITNESS: Yes.

7 THE COURT: Okay.

8 I'm sorry, Mr. Marinaccio. Go ahead.

9 Q. Do you know when the \$5,000 payment was actually made to
10 Mr. Melvin?

11 A. Yes.

12 Q. When was that?

13 A. February 21st, 2004.

14 MR. ALLEE: Your Honor, if the record could just
15 reflect the witness appears to have refreshed his recollection
16 with a document before he made the answer to the question.

17 Q. Which page of the document did you look at to get that
18 date, sir?

19 A. Last page. It's on the bottom of --

20 Q. Date received, February 21st, 2004?

21 A. Yeah. It's also reflected on the bottom of the request to
22 advance funds. When I return, if there's any money to return,
23 it has the date on it. It's basically the date that's used.

24 Q. Now, you were part of this prosecution team, were you not,
25 the prosecution team that was prosecuting Mr. Roth and Mr. St.

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1 John? Correct?

2 A. Yes.

3 Q. And you were in court with the U.S. Attorneys every day,
4 correct?

5 A. Yes.

6 Q. And you indicated that, when you received the request from
7 Mr. Melvin, was he residing in the New York area or was he down
8 in Virginia at the time?

9 A. He was residing in Virginia.

10 Q. Okay. And according to Petitioner's Exhibit 11-A, the
11 second page, the amount that the Judge pointed out dated
12 10-24-02, relocation expense of \$3,000, was that to assist him
13 to relocate down to Virginia?

14 A. Possibly some of it. He was initially relocated out of the
15 City of Newburgh briefly, right before the takedown.

16 Q. Now, getting back to the payment of the \$5,000, you
17 indicated that you had spoken to Agent McKenna about how you
18 can go about doing this, and you came up with the reward
19 scenario, correct?

20 A. Yes.

21 Q. And you were in court just about every day the court's in
22 session on the Roth and St. John matter. Did you ever discuss
23 this additional payment with either Mr. Colton or Ms. Seibel?

24 A. I may have. I don't know.

25 Q. And do you have any recollection of when you might have

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1 discussed it with -- well, let's break it down.

2 Do you recall ever discussing it with Mr. Colton?

3 A. I don't recall.

4 Q. How about with Ms. Seibel?

5 A. No.

6 Q. But you may have?

7 A. Yes.

8 Q. And if you had discussed it with one of them, is there one
9 in particular that you would have discussed it with or doesn't
10 matter?

11 MR. ALLEE: Objection.

12 THE COURT: Overruled.

13 A. No.

14 Q. Do you have any idea where that discussion might have taken
15 place?

16 MR. ALLEE: Objection.

17 THE COURT: Sustained.

18 Q. Do you have any recollection of whether or not the trial
19 was still going on?

20 MR. ALLEE: Objection.

21 THE COURT: Sustained.

22 Q. Is it your testimony, Agent Boss, that, to the extent the
23 Petitioner's Exhibit number 1 reflects the payment of a reward
24 as opposed to a request or the fulfillment of a request for
25 subsistence, that that report is inaccurate?

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1 MR. ALLEE: Objection.

2 THE COURT: I'm not sure I understand the question,
3 Mr. Marinaccio. Perhaps you can rephrase it.

4 MR. MARINACCIO: I'm sorry to be repetitious, Judge.
5 It's the only way I can rephrase it.

6 Q. You've indicated that the request came sometime early in
7 the year, to the best of your recollection, from Mr. Melvin
8 that he needed some help.

9 A. Yes.

10 Q. He was falling on some hard times.

11 You discussed it with Agent McKenna. And the only way
12 you came up with that you can get him that help was to prepare
13 a document for a reward, correct?

14 A. Yes.

15 Q. And the document itself, with the exception of the one box
16 that's checked off as subsistence, the descriptions all reflect
17 a reward, correct?

18 A. Yes.

19 Q. Is it your testimony that, to the extent the document
20 reflects the reward and not subsistence, that that document,
21 Petitioner's Exhibit 1, is inaccurate?

22 MR. ALLEE: Objection.

23 THE COURT: Well, Mr. Boss, looking at the very last
24 page of Petitioner's Exhibit 1, am I correct that, on that
25 page, as well as on the third page, there's a box checked that

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1 says subsistence?

2 THE WITNESS: Correct.

3 THE COURT: All right.

4 Perhaps you can rephrase it, Mr. Marinaccio.

5 Q. Well, other than the two boxes that reflect subsistence,
6 the descriptions themselves reflect only a reward, correct?

7 A. Yes.

8 Q. To the extent that the descriptions reflect only a reward,
9 Petitioner's Exhibit 1 is inaccurate, correct?

10 MR. ALLEE: I object to this. This mischaracterizes
11 the document in evidence.

12 THE COURT: I'll allow this question, and then we're
13 moving on.

14 You may answer the question, if you can.

15 A. But you got to ask it again. I don't --

16 Q. To the extent the descriptions that are contained in
17 Petitioner's Exhibit 1, the descriptions, reflect only the
18 payment of a reward and make no mention of subsistence
19 payments, that document is inaccurate, correct?

20 MR. ALLEE: I renew that objection.

21 THE COURT: Overruled.

22 A. The narrative in this request for the reward is correct.

23 Q. But the initial request was for subsistence payments,
24 correct? That's what Mr. Melvin wanted?

25 A. The understanding is, yes, yes.

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1 Q. And there's nothing in the description that indicates that,
2 in fact, there was a subsistence -- this payment was for
3 subsistence?

4 A. Correct.

5 Q. There's no mention of rent, relocation, hard times, none of
6 that, correct?

7 MR. ALLEE: Objection.

8 THE COURT: The document speaks for itself,
9 Mr. Marinaccio. I can read it.

10 MR. MARINACCIO: Thank you, your Honor. You are
11 correct. It does speak for itself.

12 Q. Now, Agent Boss, by the time Mr. Melvin was testifying at
13 the trial of Mr. Roth and Mr. St. John, he had already executed
14 a cooperation agreement, correct?

15 A. Yes.

16 MR. MARINACCIO: I am going to show the witness, with
17 your permission, what I've marked as Petitioner's Exhibit 2. I
18 have a copy for the Court as well.

19 THE COURT: Thank you.

20 Q. Do you recognize what has been marked, premarked, as
21 Petitioner's Exhibit 2?

22 A. No.

23 Q. You don't recognize Petitioner's Exhibit 2 as being the
24 cooperation agreement?

25 A. I don't know if I've ever seen it.

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1 Q. Were you aware of whether or not, when he testified in the
2 trial of Mr. Roth and Mr. St. John, that he had a cooperation
3 agreement in place?

4 A. Yes, he did.

5 Q. But you don't recognize that document as being the
6 cooperation agreement?

7 A. It could be, but I've never seen it before.

8 Q. Well, take a look at the last page of the document. Do you
9 recognize the signature of Mr. Melvin?

10 A. Yes.

11 Q. Do you recognize the signature of Mr. Colton?

12 A. Not -- no.

13 MR. ALLEE: Objection, your Honor.

14 THE COURT: Overruled.

15 No?

16 Q. You don't recognize it?

17 A. No.

18 Q. Well, let me ask you this, then. Other than the
19 cooperation agreement that Mr. Melvin signed with the
20 government, were you aware of any other agreements that
21 Mr. Melvin had signed that reflected benefits that he was to
22 receive in connection with his cooperation?

23 A. No.

24 Q. And do you recall testifying at the trial of Mr. Roth and
25 Mr. St. John concerning the cooperation agreement that

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1 Mr. Melvin had with the government?

2 MR. ALLEE: Objection. Relevance.

3 THE COURT: Overruled.

4 A. You asked me if I remember testifying about his
5 cooperation?

6 Q. Cooperation agreement.

7 A. I don't remember.

8 MR. MARINACCIO: Your Honor, I'm going to show Agent
9 Boss what I've premarked as Petitioner's Exhibit 3.

10 Q. Now, directing your attention in particular in Plaintiff's
11 Exhibit 3 to page 290, line 20 to page 291, line 21. I would
12 ask you to read that to yourself.

13 A. I'm sorry. What was the end?

14 Q. From 290, line 20 to 291, line 21.

15 A. Okay.

16 Q. It's on several pages the way the computer broke it up.

17 (Pause)

18 A. Okay.

19 Q. Does that refresh your recollection that, during your
20 direct testimony at the trial, you were asked questions
21 regarding Mr. Melvin's cooperation agreement with the
22 government?

23 MR. ALLEE: Objection. Well, your Honor --

24 THE COURT: The question is does it refresh his
25 recollection.

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1 MR. ALLEE: Your Honor, I will withdraw that
2 objection.

3 THE COURT: All right.

4 Go ahead. Answer the question.

5 A. Does it refresh my recollection?

6 Q. Yes.

7 A. Yes.

8 Q. Now, you were asked questions about whether or not
9 Mr. Melvin, pursuant to his cooperation, had to make any
10 recordings in connection with the St. John/Roth matter,
11 correct?

12 A. Whether he had to? Yes.

13 Q. Whether he had to.

14 You recall that?

15 A. Whether he had to make recordings?

16 Q. Right. Pursuant to his cooperation agreement.

17 A. Just ask me the question again.

18 Q. Do you recall being asked questions at the trial about
19 whether or not Mr. Melvin had to participate in making phone
20 calls in connection with the Roth/St. John investigation in
21 November of 2002 in order to satisfy his obligations with the
22 government?

23 A. I don't specifically remember the part about making
24 recorded calls.

25 Q. Well, do you recall testifying that you had advised

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1 Mr. Melvin --

2 THE COURT: Don't try to summarize the testimony.

3 Either read the specific question and answer or move on.

4 Q. Do you recall being asked these questions and giving these
5 answers, beginning on page 290, line 20:

6 "Q. Prior to the time that Charles Melvin began making
7 recordings of David St. John, Malcolm O'Brien and Yolanda
8 Delgado at your instruction, did you have a conversation with
9 him with respect to his obligation to do that?

10 "A. Yes.

11 "Q. Okay. What did you tell him?

12 "A. I told him it was up" -- this is at page 291 now, at the
13 top.

14 A. Got it.

15 Q. Okay.

16 "A. I told him it was up to him if he wanted to continue this
17 investigation.

18 "Q. Did you tell him what effect, if any, that might have on
19 his chances of getting the benefits of his cooperation
20 agreement?

21 "A. Yes.

22 "Q. What did you tell him?

23 "A. I told him that he was cooperating, he was doing
24 everything he was supposed to do, and, by not doing this
25 investigation, which was up to him, it would not effect the

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1 outcome of his cooperation.

2 "Q. Did you promise him that he would already get the 5K
3 letter?

4 "A. No.

5 "Q. Did you explain to him what his obligations were in order
6 to earn that?

7 "A. Yes.

8 "Q. What was some of the obligations you explained that he
9 had?

10 "A. Stay out of trouble, do not get arrested, continue to tell
11 the truth and provide information."

12 Do you recall being asked those questions and giving
13 those answers?

14 A. Not specifically.

15 Q. Well, then, let me ask you this. In November of 2002, when
16 Mr. Melvin was making these recorded conversations, he didn't
17 have a cooperation agreement, did he?

18 MR. ALLEE: Judge, again, I object to the relevance to
19 that question and to this line of questions.

20 THE COURT: I'll allow brief inquiry in this
21 direction.

22 To the best of your knowledge, Mr. Boss, was there any
23 other cooperation agreement involving Mr. Melvin other than
24 Petitioner's Exhibit 2?

25 MR. MARINACCIO: Well, Judge, he doesn't recognize 2.

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1 THE COURT: I know he doesn't recognize it. I'm
2 asking if he's aware of any other cooperation agreement. He
3 did say he was aware that there was a cooperation agreement.
4 He couldn't identify that one. My question is if he's aware
5 whether there were any other cooperation agreements.

6 THE WITNESS: No.

7 THE COURT: Go ahead. Put your next question.

8 Q. Are you aware if there was any kind of agreement whatsoever
9 that reflected what benefits Mr. Melvin might expect to receive
10 in connection with his cooperation with the ATF, ATF and E?

11 A. I was aware he was eventually signed up with a cooperation
12 agreement, but I don't know what the timing was, though.

13 MR. MARINACCIO: Your Honor, I would offer
14 Petitioner's 3 into evidence. I know it's a part of the Court
15 record, the trial record, but I would offer that particular
16 section into evidence.

17 MR. ALLEE: Judge, I don't object. I'm sure they're
18 authentic because they're being offered. And any trial
19 transcripts Mr. Roth seeks to admit for your Honor to consider,
20 I don't object on any sort of authenticity grounds.

21 THE COURT: Okay. Petitioner's 3 is received.

22 MR. ALLEE: Or foundation grounds. He can put them in
23 with or without this witness is what I'm saying.

24 THE COURT: I understand. Thank you.

25 (Petitioner's Exhibit 3 received in evidence)

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1 Q. Agent Boss, by the way, in connection with the application
2 for a reward, Petitioner's Exhibit 1, did you have any
3 discussion -- other than with Agent McKenna, did you have
4 discussions with any other agent regarding that reward payment?

5 A. Probably.

6 Q. Do you recall ever having any discussion with -- I guess
7 he's, today, Lieutenant Campbell of the Newburgh Police
8 Department?

9 A. Deputy chief.

10 Q. Deputy chief. I'm sorry. I didn't mean to demote him.
11 Did you have any discussion with him?

12 A. I don't remember, but, most likely, yeah.

13 Q. Do you recall being asked questions on cross-examination
14 regarding -- cross-examination by Mr. Hochheiser, Mr. Roth's
15 attorney, regarding the possibility of Mr. Melvin getting a 5K1
16 letter?

17 MR. ALLEE: Objection.

18 THE COURT: Overruled.

19 MR. ALLEE: Relevance.

20 THE WITNESS: Answer?

21 THE COURT: Yes.

22 A. Again, I don't specifically remember, but it's highly
23 likely.

24 MR. MARINACCIO: Your Honor, I would like to show the
25 witness what I've marked as Petitioner's Exhibit 4.

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Boss - Direct

1 Q. And in particular, Agent Boss, I would like to direct your
2 attention to page 558, line 24 to page 559, line 24.

3 A. Okay.

4 Q. Okay.

5 A. Stop at -- sorry. Stop at line 24 again on 559.

6 Q. On 559.

7 A. Okay.

8 Q. And then let me direct your attention again also to page
9 560, lines 3 to 5.

10 A. Okay.

11 Q. And page 560, line 12 to page 563, line -- I'm sorry, page
12 560, line 12 on page 563, lines 10 to 13.

13 A. Just the one line, 12, on 560?

14 Q. I'm sorry. Let me start that over again.

15 Page 560, line 12, and then go to 561, lines 6 to 11.

16 A. 6 through 11? Okay.

17 Q. And page 563, lines 10 to 13.

18 A. Okay.

19 Q. Does that refresh your recollection that, on
20 cross-examination by Mr. Hochheiser, you were asked questions
21 concerning the benefit of a 5K1 letter for Mr. Melvin and
22 whether or not you had discussed that with him?

23 A. Still doesn't refresh my recollection.

24 Q. Okay. Turning now to page 558, line 24. Do you recall
25 being asked these questions and giving this answer at the

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Boss - Direct

1 trial.

2 A. One second.

3 Q. It's on the unmarked page. It's the continuation of page
4 558. You got it?

5 A. Yes.

6 Q. Okay.

7 "Q. Now, Mr. Melvin signed a cooperation agreement with the
8 government; is that right?

9 "A. Yes, he did.

10 "Q. Okay. And that's a cooperation agreement that deals with,
11 among other things, the subject of this 5K1 letter that we have
12 been talking about?

13 "A. Yes.

14 "Q. Now, on November 21st, 2002, Mr. Melvin had not signed a
15 cooperation agreement; is that right?

16 "A. I'm not sure.

17 "Q. Well, he signed it on January 8th, 2003; did he not?

18 "A. I'm not sure.

19 "Q. You don't know whether Mr. Melvin signed a cooperation
20 agreement on or about November 21st, 2002, at the time of this
21 conversation with St. John?

22 "A. No; I do not.

23 "Q. Did you discuss with Mr. Melvin his cooperation on
24 November 21st, 2002?

25 "A. Did I discuss his cooperation on that date? I don't

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1 recall.

2 "Q. Did you discuss his cooperation shortly before that date?

3 "A. We did discuss it, yes.

4 "Q. Did you discuss with him the question of benefits that he
5 might receive?

6 "A. No."

7 Do you recall being asked those questions and giving
8 those answers?

9 MR. ALLEE: Objection. There's no inconsistency.

10 MR. MARINACCIO: He says he doesn't recall.

11 THE COURT: Overruled.

12 A. No, I don't recall.

13 Q. Okay.

14 Going now to page 560, lines 3 to 5, do you recall
15 being asked this question and giving this answer:

16 "Q. And did you explain to him the procedures -- the concept
17 concerning the 5K1 letter?

18 "A. No; I did not, no."

19 And then going down to line 8:

20 "Q. Well, then, you testified on direct that when you said to
21 Mr. Melvin you don't have to, you know, do this for some reason
22 that you had already done a good deal, something like that,
23 right? You had already done a lot?

24 "A. He had done enough to earn a letter, yes."

25 Do you recall being asked those questions and giving

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Boss - Direct

1 those answers?

2 MR. ALLEE: I object to this method of questioning.
3 The witness doesn't recall. There's no inconsistency for which
4 he could read in prior testimony.

5 THE COURT: All of the testimony is part of the record
6 before the Court. Doesn't matter whether he reads it in or
7 not. It's a part of the record before the Court and may be
8 considered and may be the subject of argument. So I'm not
9 quite sure why we're using our time this way, but I'll overrule
10 the objection.

11 MR. MARINACCIO: I'm just looking to highlight those
12 portions, your Honor, without having to search through a
13 6,000-page record.

14 MR. ALLEE: Just to hone in on my objection, your
15 Honor, we can argue about the transcript all day, but Mr. Boss
16 is on the stand now, the Petitioner has called him, and there's
17 no basis to read to him prior testimony for a purpose other
18 than to show an inconsistency.

19 THE COURT: I don't disagree with you.
20 Q. Well, let me ask you this, then, Agent Boss. Having read
21 the sections of the transcript that I've pointed out to you,
22 they do not refresh your recollection that you were asked at
23 the trial questions about Mr. Melvin's cooperation and his
24 eligibility for a 5K letter, correct? Is that your testimony?
25 A. Yes. It doesn't refresh my recollection.

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Boss - Direct

1 MR. MARINACCIO: Your Honor, I offer Petitioner's 4,
2 the excerpts, into evidence.

3 MR. ALLEE: Again, I have no objection to the Court's
4 receiving the transcript, copies of the transcript.

5 THE COURT: Okay. Petitioner's 4 is received.

6 (Petitioner's Exhibit 4 received in evidence)

7 Q. Do you recall on redirect being asked by Mr. Colton,
8 following the cross-examination by Mr. Hochheiser, about any
9 discussions you may have had with Mr. Melvin concerning
10 Mr. Melvin's cooperation and his eligibility for a 5K letter?

11 MR. ALLEE: Objection.

12 THE COURT: Overruled.

13 A. No.

14 MR. MARINACCIO: Your Honor, I'm going to show the
15 witness what we've marked as Petitioner's Exhibit 5 for
16 identification. We have a copy for the Court as well.

17 Q. Agent Boss, I would like to direct your attention to page
18 742, lines 10 through 15 and lines -- well, let's stay with
19 that so we don't confuse.

20 A. Okay.

21 Q. Page 742, lines 10 through 15. Does that refresh your
22 recollection that you were asked on redirect by Mr. Colton
23 concerning any discussions you may have had with Mr. Melvin
24 regarding his obligations?

25 A. No.

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Boss - Direct

1 Q. And now directing your attention to that same page, but the
2 continuation, line 23. So that would be page 742, line 23 to
3 page 743, line 1.

4 A. Okay.

5 Q. Okay. Does that refresh your recollection that you were
6 asked questions by Mr. Colton on redirect concerning
7 Mr. Melvin's obligations?

8 A. No.

9 MR. MARINACCIO: Your Honor, I offer Petitioner's 5
10 into evidence.

11 MR. ALLEE: No objection.

12 THE COURT: Petitioner's 5 is received.

13 (Petitioner's Exhibit 5 received in evidence)

14 Q. Do you recall, Agent Boss, if you were asked any questions
15 on recross by Mr. Hochheiser concerning Mr. Melvin's
16 cooperation agreement and what his expectations might be and
17 what you may have discussed with him about that?

18 MR. ALLEE: Again, I object to all of this on
19 relevance grounds.

20 THE COURT: I understand the objection. Overruled.

21 A. No, sir.

22 MR. MARINACCIO: Your Honor, I would like to show the
23 witness what has been marked as Petitioner's Exhibit 6 with a
24 copy for the Court.

25 Q. I would like to draw your attention to page 770, line 21

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Boss - Direct

1 through page 772, line 18.

2 A. Stop at 17, you said?

3 Q. Page 772, line 18.

4 A. Oh, 18. Okay.

5 Q. Does that refresh your recollection that, on recross by
6 Mr. Hochheiser, you were asked questions concerning the
7 cooperation agreement and any discussions you may have had with
8 Mr. Melvin regarding his expectations of any benefit?

9 A. No.

10 Q. Does it refresh your recollection that the government
11 stipulated that, in fact, Mr. Melvin signed the cooperation on
12 January 22nd, 2003?

13 A. Does not.

14 MR. MARINACCIO: Your Honor, I offer what I've marked
15 as Petitioner's Exhibit 6 into evidence.

16 MR. ALLEE: No objection.

17 THE COURT: Petitioner's 6 is received.

18 (Petitioner's Exhibit 6 received in evidence)

19 Q. Agent Boss, do you recollect whether or not you advised the
20 jury during your testimony either on direct, cross-examination,
21 redirect, recross as to whether or not there was any other
22 agreement with Mr. Melvin regarding his cooperation and what
23 benefits he might expect to receive if he lived up to his end
24 of the bargain?

25 A. No.

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Boss - Direct

1 Q. Do you recall discussing in your testimony at the trial any
2 other benefit that Mr. Melvin might expect to receive other
3 than a 5K1 letter from the government?

4 A. No.

5 Q. Did you discuss with the jury any other benefit, for
6 example, in the form of cash payments, whether they be for
7 reward or subsistence or anything of that nature?

8 A. I don't remember.

9 Q. And you don't remember discussing even the 5K1 letter
10 benefit that he might receive?

11 A. No.

12 Q. Now, Mr. Melvin himself testified in this trial, correct,
13 at the trial of Mr. St. John and Mr. Roth?

14 A. He did.

15 Q. And were you present in the courtroom during his testimony?

16 A. Most of it, I believe, yes.

17 Q. And he was called as a witness by the government, correct?

18 A. Yes.

19 Q. And do you recollect as you sit here now that, as part of
20 his cooperation agreement, he was expected to make himself
21 available to testify when required by the government?

22 A. That's part of the cooperation agreements, yes.

23 Q. And do you recall as you sit here now that, when Mr. Melvin
24 took the witness stand in the Roth and St. John matters, he was
25 testifying pursuant to his obligations under a cooperation

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Boss - Direct

1 agreement?

2 A. That's my understanding, yeah.

3 Q. Were you present during any prep sessions that Mr. Melvin
4 may have engaged in with the government prior to his actual
5 testimony?

6 A. Yes.

7 Q. During any of those prep sessions, was the issue of a 5K1
8 letter under the guidelines discussed with Mr. Melvin?

9 MR. ALLEE: Objection. Relevance.

10 THE COURT: Overruled.

11 You may answer the question.

12 A. Yeah. I'm sure it was several times.

13 Q. And as you sit here now, can you tell us essentially what
14 was the discussion with Mr. Melvin regarding the 5K letter
15 during these prep sessions?

16 A. During the prep for the trial?

17 Q. Yes.

18 A. They generally -- I don't remember specifically if they
19 actually showed it to him and said this is what you're going to
20 be asked about, the actual 5K letter, cooperation agreement,
21 or -- no, the 5K. I don't know if they discussed how it's
22 going to work or -- I don't know the specifics. They
23 definitely discussed it, though. It's preparation for trial,
24 yes.

25 Q. And your recollection of what they discussed was the

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Boss - Direct

1 cooperation agreement and a 5K letter, correct?

2 A. Topics, yeah, that would come up during cross or direct,
3 sure.

4 Q. Was there any discussion regarding any payments that may
5 have been made to Mr. Melvin and what questions he might expect
6 in that regard?

7 A. No.

8 Q. Anything about the subsistence payments that are reflected
9 on the Petitioner's Exhibit 11? 11-A, rather?

10 A. They may have brought that up with him. I'm not sure.

11 Q. Was there any discussion whether he can expect any
12 questions regarding any reward, cash reward, that he might
13 ultimately receive?

14 A. No.

15 Q. Do you recall specifically, on direct examination by
16 Mr. Colton, Mr. Melvin testifying regarding his cooperation
17 agreement?

18 MR. ALLEE: Objection. There's no relevance
19 whatsoever of Agent Boss' recollection of the testimony of
20 other witnesses.

21 THE COURT: Sustained.

22 Q. Well, you were present -- were you present during the
23 testimony of Mr. Melvin?

24 THE COURT: If you want to make argument --

25 MR. ALLEE: Objection.

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Boss - Direct

1 THE COURT: -- Mr. Marinaccio, about other things in
2 the transcript, make argument to me. Don't ask him what
3 somebody else may or may not have said during the testimony.
4 We have an official certified transcript. That's what I'm
5 going to pay attention to, not what this witness might say
6 about what was or was not asked.

7 Put your next question.

8 MR. MARINACCIO: Your Honor, if I may be heard just
9 briefly on that.

10 The question comes down to, it seems to me, what this
11 witness was aware of when he was putting together the
12 documentation for the reward.

13 THE COURT: Then ask him that specific question. Were
14 you aware of X?

15 MR. MARINACCIO: I thought that's where I was going.
16 I'll try to rephrase it.

17 Q. Were you aware when you were putting together the
18 documentation that's reflected in Petitioner's Exhibit number
19 1, the reward, that Mr. Melvin had been asked questions during
20 his trial testimony on direct examination, on
21 cross-examination, and even on recross and redirect regarding
22 the benefits that he might expect to receive as a result of his
23 cooperation agreement?

24 A. At the time, I would have certainly been aware.

25 Q. And you were aware, were you not, at the time you were

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Boss - Direct

1 putting together this documentation for the reward,
2 Petitioner's Exhibit 1, that Mr. Melvin testified that the only
3 benefit he hoped to get was a 5K letter, which would possibly
4 result in a reduction of his sentence, correct?

5 A. I don't remember what he testified about to that.

6 Q. You don't remember that?

7 A. To that particular stuff, no.

8 MR. MARINACCIO: Your Honor, I have excerpts of
9 Mr. Melvin's trial testimony which I would like the Court to
10 consider specifically on this issue.

11 THE COURT: Fine.

12 MR. MARINACCIO: May I offer them into evidence at
13 this point?

14 THE COURT: Sure.

15 MR. MARINACCIO: I am offering what has been marked as
16 Petitioner's Exhibit 7 and Petitioner's Exhibit 8.
17 Specifically, your Honor, on Petitioner's Exhibit 7, I'm
18 offering page 801, line 11 to page 806, line 23 and page 804,
19 line 7 to 9. And on Petitioner's number 8, I am specifically
20 offering for the Court's consideration page 990, line 3 to page
21 992, line 24, page 1029, line 5 to line 20, and page 1044, line
22 15 to line 20.

23 May I hand them up to the Court?

24 THE COURT: Yes, certainly. 7 and 8 are received.

25 (Petitioner's Exhibits 7, 8 received in evidence)

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Boss - Direct

1 Q. Now, Agent Boss, were you present in the courtroom during
2 the summations and the rebuttal summations that were given to
3 the jury by Mr. Colton and Ms. Seibel, respectively?

4 MR. ALLEE: Objection. Any line of this inquiry
5 cannot be relevant.

6 THE COURT: I'm not sure why we're doing it in this
7 fashion, Mr. Marinaccio. I think it's a tremendous waste of
8 time. I'll allow you to point me to something. If the
9 question is were you aware -- I don't get it because this would
10 have had nothing to do time-wise with what he knew or didn't
11 know at the time that he put in the application for the reward.
12 I'm very confused, Mr. Marinaccio. I think you're wasting the
13 Court's time.

14 MR. MARINACCIO: I apologize if the Court thinks I'm
15 wasting time. My point is, your Honor, that this witness had
16 the opportunity between early part of January of 2004, when he
17 apparently began this process, and the trial's conclusion to
18 not only bring this to the attention of the government, but
19 also had various triggers that would have alerted him to make
20 that information known to the prosecutors, not the least of
21 which was the fact that he was in court when he heard questions
22 regarding this benefit pursuant to the cooperation agreement,
23 and he heard the summations by both Mr. Colton and Ms. Seibel,
24 which referred to the benefits that Mr. Melvin could have
25 received. That's the point, Judge. And the point being that

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Boss - Direct

1 my client was prejudiced by the fact that this revelation was
2 not --

3 THE COURT: Well, that's the argument.

4 MR. MARINACCIO: That's the argument.

5 THE COURT: We're looking for facts now,
6 Mr. Marinaccio.

7 MR. MARINACCIO: That facts, your Honor --

8 THE COURT: That's what I'm asking you to elicit.

9 And guess what? When you talk and I talk, she only
10 hears me.

11 MR. MARINACCIO: I understand that, Judge.

12 THE COURT: So there's no point in your trying to talk
13 over me. It won't do any good.

14 If you want the Court to focus on a specific portion
15 of the summation and you want to ask the witness whether he was
16 present, then ask that question.

17 Q. Were you present during the summation of Mr. Colton where
18 he argued that the benefit that Mr. Melvin could expect to
19 receive -- and his summation was on February 9th, 2004. Were
20 you present when Mr. Colton made the argument that the benefit
21 he would receive was his 5K letter and that he risked that if
22 he didn't tell the truth?

23 MR. ALLEE: Objection. Compound.

24 THE COURT: Sustained.

25 Were you present during the summations?

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Boss - Direct

1 Q. Were you present during the summations?

2 A. Yes.

3 THE COURT: All right, then, focus my attention on the
4 specific part of the summation that you want my attention
5 focused on. He was present. That's all you need to do.

6 MR. MARINACCIO: Your Honor, I would like to offer to
7 the Court Petitioner's Exhibit 9 specifically referencing page
8 4700, lines 13 to 22.

9 THE COURT: Petitioner's 9 is received.

10 (Petitioner's Exhibit 9 received in evidence)

11 Q. Agent Boss, were you present during the rebuttal summation
12 of Ms. Seibel?

13 A. Yes.

14 Q. Do you recall her arguing about the benefit Mr. Melvin
15 could expect to receive pursuant to the cooperation agreement
16 and what he risked if he did not tell the truth, specifically
17 the 5K letter?

18 MR. ALLEE: Objection.

19 THE COURT: He was present.

20 Q. Were you present?

21 A. Yes.

22 MR. MARINACCIO: Your Honor, I would offer what I've
23 marked as Petitioner's Exhibit 10, specifically page 4970,
24 lines 18 to 22 to page 4974, line -- oh, sorry -- page 4970,
25 lines 18 to 22 and page 4974, lines 6 to 11.

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Boss - Direct

1 THE COURT: All right. Petitioner's 10 is received.

2 (Petitioner's Exhibit 10 received in evidence)

3 Q. During the summations of Mr. Colton and Ms. Seibel, did you
4 ever consider advising them of the application for the reward
5 that's reflected in Petitioner's number 1?

6 MR. ALLEE: Objection.

7 THE COURT: Overruled.

8 A. Not that I remember.

9 Q. Is there any particular reason why you did not advise them?

10 A. I don't know if I did or didn't.

11 MR. MARINACCIO: May I have a moment, your Honor?

12 THE COURT: Yes, sure.

13 (Pause)

14 Q. Agent Boss, are you familiar with the Attorney General's
15 guidelines regarding the use of confidential informants?

16 MR. ALLEE: Objection.

17 THE COURT: Overruled.

18 You may answer the question.

19 A. I've heard of them. I mean, familiar as in well versed?

20 MR. MARINACCIO: Your Honor, I'm going to ask the
21 witness be shown Petitioner's Exhibit 12.

22 Q. Specifically, I want to draw your attention to section
23 III(b) (8) .

24 THE COURT: Is there a page?

25 MR. MARINACCIO: I'm looking for it right now, Judge.

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Boss - Direct

1 Page 19.

2 Q. Are you familiar with that provision -- or were you
3 familiar with that provision at the time that you were
4 preparing the application for voucher and reward?

5 A. No.

6 Q. You were not familiar with your obligation to coordinate
7 with the U.S. Attorney's Office any payments made to a
8 confidential informant?

9 A. I was aware of that, but this -- referring to this, no.

10 MR. MARINACCIO: Your Honor, I offer Petitioner's 12
11 in evidence, in particular the section III(b) (8).

12 MR. ALLEE: I object to this, your Honor. I would
13 voir dire, but he's the wrong witness. I object to the time
14 period for this, where Mr. Marinaccio got it, when it was in
15 effect, the agencies it's provided to. This may be something
16 we don't need any witnesses for. If he wants to argue about
17 it, I'm sure we can figure it out, but, so far, I haven't heard
18 any basis for the time period for this or the use of this being
19 offered by Petitioner.

20 THE COURT: Well, I see on the last page that it's
21 dated May 3th, 2002, so I suppose it would have some
22 application to at least some of the period of time during which
23 Mr. Melvin was cooperating, which started before May 30th,
24 2002.

25 I'll receive it. The weight, however, in this context

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Boss - Direct

1 is pretty limited. I don't think the issue before the Court
2 has anything to do with whether Mr. Boss did or didn't comply
3 with any guidelines. The only relevance would be whether he
4 had reason to know that the information should be shared with
5 members of the prosecution, but whether he did or didn't
6 comply, that's not an issue before me. I will receive it for
7 that limited purpose only. And what I've heard so far is less
8 than convincing. Petitioner's 12 is received for that purpose.

9 (Petitioner's Exhibit 12 received in evidence)

10 Q. Agent Boss, you prepared an affidavit in connection with
11 these proceedings?

12 A. Yes.

13 Q. And in that affidavit, you explained the circumstances
14 surrounding the payment of the \$5,000 reward to Mr. Melvin,
15 correct?

16 A. Yes.

17 Q. I will show you what has been marked as Petitioner's
18 Exhibit 14.

19 Is that the affidavit?

20 A. Yes.

21 Q. Now, in that affidavit, sir, you speak about, in paragraph
22 1, the subsistence payments that were made to Melvin, correct?

23 A. Yes.

24 Q. And in the second paragraph, you talk about the \$5,000
25 payment, correct?

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Boss - Cross

1 A. Yes.

2 Q. And in that second paragraph, there's no mention, is there,
3 of any request by Mr. Melvin for subsistence assistance?

4 A. No.

5 MR. MARINACCIO: Your Honor, I offer Petitioner's
6 Exhibit 14.

7 MR. ALLEE: No objection.

8 THE COURT: 14 is received.

9 (Petitioner's Exhibit 14 received in evidence)

10 MR. MARINACCIO: I have no further questions, your
11 Honor. Thank you.

12 THE COURT: Mr. Allee.

13 MR. ALLEE: Thank you, your Honor.

14 CROSS-EXAMINATION

15 BY MR. ALLEE:

16 Q. Good afternoon, Agent Boss.

17 A. Good afternoon.

18 Q. You testified that you were responsible for essentially
19 handling Charles Melvin as a cooperator for ATF.

20 A. Yes.

21 Q. Roughly when did you begin working with Melvin as a
22 cooperator?

23 A. Roughly March of 2002.

24 Q. How did it come about that you began working with him as a
25 cooperator?

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Boss - Cross

1 A. I received a call from Bruce Campbell -- Donald Campbell
2 from the City of Newburgh Police Department. They had arrested
3 Charles Melvin with some guns the night before, and he wanted
4 to talk.

5 Q. Campbell was an officer in the City of Newburgh?

6 A. He was a detective at the time.

7 Q. Did you thereafter work with Melvin in a cooperating
8 capacity?

9 A. Yes.

10 Q. Can you describe generally the work that Melvin did.

11 A. Street-level work. We investigated middle-level drug
12 dealers, purchased crack cocaine, cocaine, a little bit of
13 heroin, purchased guns with him, all the while wiring him up,
14 putting on recorders, transmitters.

15 Q. And, just roughly, how many cases did you work with Melvin
16 where Melvin was cooperating with law enforcement?

17 A. Cases? About five.

18 Q. And again, just approximately, a ballpark, how many
19 individuals -- withdrawn.

20 How many people who were targets, whether or not they
21 became criminal defendants, but people who were targets in the
22 work that you did with Melvin?

23 A. Approximately like 30.

24 Q. Now, prior to testifying in the trial of Donald Roth, the
25 Petitioner here, Melvin was provided money in connection with

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Boss - Cross

1 his cooperating?

2 A. He was provided subsistence.

3 Q. Who provided Melvin with -- well, withdrawn.

4 When you say subsistence, what do you mean?

5 A. Money to spend on rent, phone, food.

6 Q. And a name for that under the ATF procedures is subsistence
7 money?

8 A. Yes.

9 Q. That's what that's called?

10 A. Yes.

11 Q. Who provided Melvin with that money? Again, this is prior
12 to his testifying at the trial.

13 A. Me.

14 Q. And were you responsible for doing that on behalf of ATF?

15 A. Yes.

16 Q. When you say me, you're talking about ATF?

17 A. Mostly just me, but I get the money through ATF. I thought
18 you meant directly to him.

19 Q. Let me just clarify that for the record.

20 It's the ATF that's providing money to Melvin?

21 A. Yes.

22 Q. And you're the person responsible for doing that at ATF?

23 A. Correct.

24 Q. While he was cooperating, and again, I'm still asking about
25 prior to the testimony at trial, Melvin was not in custody; is

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Boss - Cross

1 that right?

2 A. He was in custody briefly, for maybe two weeks after his
3 initial arrest. After that, he was out.

4 Q. So at some point -- that's sort of around March of '02,
5 but, after that, he's working and he's not in custody?

6 A. Correct.

7 Q. Now, at about the time Melvin testified in the trial of
8 Donald Roth, where was he living?

9 A. Virginia.

10 Q. After Melvin testified in the trial of Roth, did he contact
11 you?

12 A. Yes.

13 Q. On direct, you described that it was early in the year
14 2004.

15 A. Yes.

16 Q. This is about roughly a month after Melvin's testimony?

17 A. Correct.

18 Q. Can you describe in substance for the Court your discussion
19 with Melvin when he contacted you.

20 A. He was in rough times. He -- like I said, I don't know if
21 he got kicked out or couldn't live with his mother anymore. He
22 had his girlfriend at the time. He had a couple of kids with
23 her and possibly even a couple of her kids. I remember at
24 least four kids and her and him. And they needed -- they were
25 looking for a place to stay, needed help.

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Boss - Cross

1 Q. And did he ask you, in substance, for help?

2 A. Yes.

3 Q. And in substance, how did you respond to him?

4 A. I said I'll see what I can do.

5 Q. How did he contact you? What means?

6 A. Cell phone.

7 Q. At that time, was he still a working cooperator with ATF?

8 A. No.

9 Q. Or with the Federal Government?

10 A. No.

11 Q. He was done?

12 A. Yes.

13 Q. What did you do after you spoke to Melvin to look into how
14 or whether you could help him?

15 A. That's when I contacted my boss at the time, McKenna.

16 Q. And what did you learn?

17 A. Learned that the only way we could help him out, give him
18 money, was to give him a reward.

19 Q. And what is a reward?

20 A. It's a payment of money for the work that he had done in
21 the past.

22 Q. And let me explain. I don't mean reward in the sense we
23 all use it, but you're referring to an ATF reward, capital R?

24 A. Yes.

25 Q. What is that?

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Boss - Cross

1 A. As I explained, he did a bunch of work for us, did good
2 work, so we put him in for a reward.

3 Q. And is there a protocol for obtaining and dispensing a
4 reward under ATF's procedures?

5 A. Yes.

6 Q. What's the protocol in general?

7 A. You fill out that initial form. It's on Plaintiff's
8 Exhibit 1, the top form, application for public voucher. You
9 fill out that form. It gets approved by the first-line
10 supervisor, which, in this case, was John McKenna, and then it
11 goes up the chain. Supposed to be signed by the division
12 director, or the SAC, but, in this case, it was signed by the
13 ASAC, assistant special agent in charge.

14 Q. Here, you followed that protocol in obtaining a reward for
15 Melvin?

16 A. Yes.

17 Q. And the paperwork that's Plaintiff's Exhibit 1 is part of
18 what you did to obtain that?

19 A. Yes.

20 Q. You were asked on direct examination about portions of this
21 document and whether this document, meaning Plaintiff's Exhibit
22 1, and whether you referred to what Melvin had told you about
23 Virginia. Do you recall those questions?

24 A. Yes.

25 Q. Now, in the document, on the first page, which is the

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Boss - Cross

1 application of public voucher for reward, there's a
2 justification for payment section.

3 A. Yes.

4 Q. You see that? And that's kind of the body of the document.

5 A. Yes.

6 Q. All right. That doesn't talk about Virginia or what Melvin
7 told you about Virginia, right?

8 A. No.

9 Q. But the purpose of that section is about describing,
10 basically, the assistance that the individual provided, who's
11 the candidate for the reward?

12 A. Yes.

13 Q. And that's what you described in that section?

14 A. Yes.

15 Q. And even in the first part, where it says justification for
16 payment, and there's examples, names of persons arrested,
17 seizures made, those are the types of instances of cooperation
18 that you would be describing in that section?

19 A. Right.

20 Q. Then later, where there are boxes to check about what the
21 money's for -- this is page three of Exhibit 1.

22 A. Okay.

23 Q. There's a box to check for informant subsistence. Do you
24 see that?

25 A. Yes.

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Boss - Cross

1 Q. The box is checked there; is that right?

2 A. Yes.

3 Q. And then on the last page, which is the receipt that you
4 testified about -- it's page five of the exhibit -- it says
5 investigative expenses subsistence?

6 A. Yes.

7 Q. You collected subsistence there, right?

8 A. Yes.

9 Q. So there's sort of two things going on in this document; is
10 that correct?

11 A. Correct.

12 Q. It's describing why the candidate is worthy of the reward.
13 And that's done in some portions; is that right?

14 A. Yes.

15 Q. And in other portions, there's boxes to check about what
16 the person is understood or expected to do with the money.
17 Here, it's subsistence, to subsist?

18 A. Yes.

19 Q. You've testified that the paperwork and everything having
20 to do with this \$5,000 payment took place after Melvin
21 testified?

22 A. Yes.

23 Q. At any time prior to or during Melvin's testimony, did you
24 discuss this payment with Melvin?

25 A. No.

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Boss - Cross

1 Q. And by testimony, I mean his testimony at the trial of
2 Donald Roth.

3 A. I understand.

4 Q. Did you discuss any payment or any compensation of any kind
5 to him that would be made in the future prior to or at the time
6 of his testimony?

7 A. No.

8 Q. Did anybody else in your presence do so?

9 A. No.

10 Q. You described some on direct, but let me ask this. There
11 were prep sessions for Melvin prior to his testifying?

12 A. Yes.

13 Q. Did you attend those prep sessions?

14 A. Yes.

15 Q. Do you recall now whether you attended all of those
16 sessions or just some of those sessions?

17 A. Most. Most of those sessions.

18 Q. Most. Maybe all, but you don't know?

19 A. Definitely not all. He was still being prepped while I was
20 on cross.

21 Q. So you know you weren't at all of them, but you recall that
22 you were at most of them?

23 A. Yes.

24 Q. All right.

25 Now, returning to the line of questions, in your

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Boss - Cross

1 presence at the prep sessions or really whether it was a prep
2 session or not, did anybody discuss making a payment to Melvin
3 in the future, after his testimony in the Roth trial?

4 A. No.

5 Q. Or, again, any kind of compensation?

6 A. No.

7 Q. Do you recall having any discussions with anyone at the
8 U.S. Attorney's Office, other than in connection with this
9 habeas petition, about the \$5,000 payment?

10 A. Back then, you're talking about?

11 Q. Yes.

12 Maybe I can rephrase that.

13 Whether it was back then or now, did you discuss
14 making the payment with AUSA Colton?

15 A. I don't remember if I did.

16 Q. Or then AUSA Seibel?

17 A. Same. I don't remember if I did.

18 Q. Or anyone at the U.S. Attorney's Office who took part in
19 prosecuting the Donald Roth trial.

20 A. Same.

21 THE COURT: Let me interrupt for a moment.

22 I know that Ms. Pesci's name has been referenced a
23 number of times in connection with the matter. What was her
24 connection with the prosecution?

25 MR. ALLEE: Is that for the witness, your Honor?

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Boss - Redirect

1 THE COURT: Yes.

2 THE WITNESS: She was the -- Glenn Colton was a new
3 assistant at the time when we took the Charles Melvin case. It
4 was a trigger lock, a 922(g). Terry Pesci was mentoring him,
5 basically, and then she eventually left the office after -- I
6 believe after Mr. Roth was arrested, and then Judge Seibel was
7 put on.

8 THE COURT: All right. So Ms. Pesci's involvement was
9 well before the trial.

10 THE WITNESS: Prior to trial, right.

11 THE COURT: Okay. Thank you. That's all I needed to
12 know.

13 Q. In case I left a hole in the questions, let me ask you
14 this. You've spoken to the government, to the U.S. Attorney's
15 Office, in connection with this habeus proceeding about this
16 payment of \$5,000, right?

17 A. Yes.

18 Q. Apart from that, apart from your preparing for today and
19 the habeus proceeding, did you speak to anyone at the U.S.
20 Attorney's Office about the payment before?

21 A. Not that I remember.

22 MR. ALLEE: No further questions.

23 THE COURT: Go ahead, Mr. Marinaccio.

24 REDIRECT EXAMINATION

25 BY MR. MARINACCIO:

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Boss - Redirect

1 Q. Agent Boss, in the case of a payment for subsistence and
2 subsistence alone, would it be necessary, pursuant to the
3 protocol of the ATF, to prepare the application for public
4 voucher for reward that is contained in Petitioner's Exhibit 1?

5 A. That's all driven by the -- well, partly driven by the
6 amount. I can't give -- if a guy's working for me, I can't
7 give him \$5,000.

8 Q. My question to you is, if you're making a payment that's
9 strictly to go towards subsistence as opposed to reward, would
10 the first two pages of Petitioner's Exhibit 1 need to be filled
11 out?

12 A. Depending on the amount, no.

13 Q. Okay. So you can --

14 A. The amount and the circumstances, I should say.

15 MR. MARINACCIO: Your Honor, I've marked a document as
16 Petitioner's number 18. I'll make a representation, your
17 Honor, that I received this document from the government in
18 connection with discovery. The Bates stamping is the
19 government's stamping.

20 Q. Agent Boss, do you recognize what is Petitioner's 18?

21 A. Yeah.

22 Q. Okay. This is a request for funds in the amount of \$200,
23 correct?

24 A. Yes.

25 Q. Okay. And it's basically a request for \$200 to cover

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Boss - Redirect

1 certain expenses; travel, meals, incidentals, correct?

2 A. I don't know.

3 Q. Take a look at page two of the document.

4 A. Oh. Thank you. Yes.

5 Q. Okay. Is this a report that you filled out or prepared?

6 A. I definitely did part of it because the amount in the -- on
7 the first page, the total funds column, that's my handwriting.
8 But the last page, where it's written on the bottom special
9 agent, that's not my handwriting. But the rest of it on that
10 page is. It's safe to say I had a significant part of
11 involvement in this, yeah.

12 Q. So in the case of a request for funds for expenses of, say,
13 \$200, there would be no need to present a document for an
14 application for public voucher for reward, correct?

15 A. Not for 200, no.

16 Q. Okay. And for other incidental expenses, what we see here
17 as an example in Petitioner's 18 is the type of paperwork that
18 would follow such a request, correct?

19 A. Yes.

20 MR. MARINACCIO: Your Honor, I offer Exhibit 18. And
21 I have no further questions.

22 MR. ALLEE: No objection.

23 THE COURT: Do we know whether this document relates
24 to Mr. Melvin?

25 THE WITNESS: I can tell you this, your Honor. The

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Boss - Redirect

1 last page, the receipt, has a case number, and I believe that's
2 the case number I had for Donald Roth, the 765050-03-0017.

3 THE COURT: All right. I can say, based on the
4 unredacted version of -- is it Petitioner's 1? No,
5 Petitioner's 11, sorry, that that is, in fact, the same case
6 number. So, on that understanding, Petitioner's 18 is
7 received.

8 (Petitioner's Exhibit 18 received in evidence)

9 THE COURT: Do you know, Mr. Boss, if the \$200 that's
10 referenced here is included in the list of subsistence payments
11 on Plaintiff's 11-A? Do you know? Do you know?

12 THE WITNESS: I don't.

13 THE COURT: That's fine. Thank you.

14 Mr. Allee, anything else?

15 MR. ALLEE: No, your Honor.

16 THE COURT: Mr. Boss, do you know whether there were
17 any additional payments made to Mr. Melvin between October 1st,
18 2003, which is the last date on Plaintiff's 11-A, and February
19 1st, 2004, which is the date upon which Mr. Melvin signed the
20 application that's reflected in Petitioner's 1? Do you know if
21 there were any additional subsistence payments made?

22 THE WITNESS: Between October 1st of '03, you're
23 asking?

24 THE COURT: Right. And February 1st of '04.

25 THE WITNESS: Yes, there was.

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Boss - Redirect

1 THE COURT: Do you know how many, how much?

2 THE WITNESS: I have the -- attached to that is the
3 government's victim witness forms. I think it's Wendy Olsen
4 does it in Southern District. There's an EWAP request form.

5 THE COURT: Oh, is that the 11-B?

6 THE WITNESS: Yes. It says 5100. He was paid --

7 THE COURT: But, for example, the document that's
8 numbered 1 is for a period of time in 2002, and I'm asking in
9 late --

10 THE WITNESS: Oh, I'm sorry.

11 THE COURT: -- in late 2003 into early 2004.

12 THE WITNESS: I apologize. Correct, no, there is none
13 that I know of.

14 THE COURT: Unless, for example, the document that you
15 were just provided, Petitioner's 18, if that, for example,
16 reflected the cost of Mr. Melvin's travel in order for him to
17 testify.

18 THE WITNESS: It may, but I remember the U.S.
19 Attorney's Office set up the hotel, travel.

20 THE COURT: So the payment for his travel would have
21 been taken care of through the U.S. Attorney's Office, not
22 through ATF, when it came time for his testimony.

23 THE WITNESS: He was a witness at that point, so it
24 was either through Julia Goodwin or Wendy Olsen.

25 THE COURT: I know that you've said that there were no

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1 discussions with Mr. Melvin about any potential additional
2 payments, but did you yourself either engage in communication
3 with him or observe communication by any of the other law
4 enforcement or prosecutors in this case that might be described
5 as a wink and a nod or an implication, for instance, saying
6 something like, no, you can't be assured of any additional
7 payments, but, at the same time, nodding of heads, what I would
8 describe as a wink or a nod? Did you ever engage in that with
9 Mr. Melvin or observe anyone else having that kind of
10 communication?

11 THE WITNESS: I understand what you're saying, and no.

12 THE COURT: Thank you.

13 All right, any other questions, Mr. Marinaccio, as a
14 result of my inquiry?

15 MR. MARINACCIO: No, your Honor.

16 THE COURT: Mr. Allee?

17 MR. ALLEE: No, your Honor.

18 THE COURT: Good.

19 Mr. Boss, you're excused.

20 THE WITNESS: Thank you.

21 (Witness excused)

22 THE COURT: We're going to have to take a lunch break.
23 I don't mind doing a short break, but I don't know what
24 counsel's preference is. I suspect you're going to need to eat
25 something.

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1 MR. ALLEE: I don't need to eat, your Honor. Lunch is
2 for wimps. I'm ready to go.

3 THE COURT: I need to eat.

4 MR. ALLEE: Except for you, your Honor. You're not a
5 wimp.

6 THE COURT: I mean, I'm willing to break for a half an
7 hour, but if counsel wants an hour, we can have an hour.

8 Mr. Marinaccio? I won't be critical. You want 45
9 minutes?

10 MR. MARINACCIO: Yeah. I have to walk across the
11 street and put a dime in the meter.

12 THE COURT: Okay.

13 MR. MARINACCIO: That's it.

14 THE COURT: Let's reconvene at 1:45. Thank you.

15 (Luncheon recess)

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Campbell - Direct

A F T E R N O O N S E S S I O N

1:50 p.m.

THE COURT: All right, Mr. Marinaccio, you can call your next witness.

MR. MARINACCIO: Call Deputy Chief Campbell.

DONALD BRUCE CAMPBELL,

called as a witness by the Defendant,

having been duly sworn, testified as follows:

THE DEPUTY CLERK: Please have a seat and state and spell your name for the record.

THE WITNESS: Donald, D-O-N-A-L-D, Bruce, B-R-U-C-E, Campbell, C-A-M-P-B-E-L-L.

THE COURT: You may proceed whenever you're ready.

DIRECT EXAMINATION

BY MR. MARINACCIO:

Q. Mr. Campbell, how are you currently employed?

A. I'm employed as the Deputy Chief of Police in the Town of Newburgh Police Department.

Q. How long have you been so employed?

A. I've been there for the past year.

Q. I'm going to draw your attention to the early part of 2002.

What was your law enforcement position then?

A. I was a detective in the City of Newburgh Police Department.

Q. And in connection with your role as a detective in the City

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Campbell - Direct

1 of Newburgh Police Department, did you have an occasion to
2 encounter an individual by the name of Charles Flip Melvin?

3 A. Yes.

4 Q. And when, approximately, was that?

5 A. Sometime in the early part -- early to mid 2002..

6 Q. Did you become familiar with Mr. Melvin through an arrest
7 that you had made or participated in --

8 A. Yes.

9 Q. -- of Mr. Melvin?

10 A. I didn't participate in the arrest. However, I did
11 interview him after his arrest on gun charges.

12 Q. Did you have any contact with Mr. Melvin once he became a
13 confidential informant for the Federal Government?

14 A. Yes.

15 Q. And how frequent was your contact with Mr. Melvin after
16 that?

17 A. Fairly regular while -- maybe not at first because he was
18 incarcerated immediately, but once he was released, fairly
19 regular.

20 Q. When you say regular, was it more than once a week, twice a
21 week?

22 A. I think it fluctuated different from week to week, but -- I
23 would have to guess to say any different.

24 Q. Were you working along with the agents from the Bureau of
25 Tobacco, Firearms and Explosives, ATF --

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Campbell - Direct

1 A. Yes.

2 Q. -- the ATF, in their investigation that involved the use of
3 Mr. Melvin as an informant?

4 A. Yes.

5 Q. Now, you were situated or stationed up in the Newburgh
6 area. Is that where Mr. Melvin was living at the time?

7 A. Yes.

8 Q. Now, during the course of your involvement with Mr. Melvin,
9 did you ever have any opportunity or -- withdrawn -- did you
10 ever have any occasion to discuss with him his cooperation with
11 the government and what benefits he might receive as a result
12 of his cooperation?

13 A. I didn't discuss what the government could give him. When
14 he initially indicated that he wanted to work, he had stated
15 that he wanted to turn his life around, he was tired of the
16 drug game, and said he was willing to basically do whatever he
17 needed to do in order to help himself get out of that
18 lifestyle.

19 Q. And did you forward that information over to the federal
20 authorities?

21 A. Yes.

22 Q. Did he work for the City or Town of Newburgh separate and
23 apart from the work he was doing for the ATF?

24 A. Not that I recall.

25 Q. Were you aware of a cooperation agreement that Mr. Melvin

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Campbell - Direct

1 entered into with the United States Attorney's Office for the
2 Southern District of New York?

3 A. Just that he entered into an agreement. I don't know the
4 specifics of it.

5 Q. I'm going to show you what we have we've marked for
6 identification as Petitioner's Exhibit 2 and ask you if you
7 recognize this document.

8 A. It appears to be a cooperation agreement.

9 THE COURT: Are you familiar with it, sir?

10 THE WITNESS: I don't believe I've ever read this
11 before.

12 Q. Did you ever see any cooperation agreement that
13 specifically dealt with the cooperation of Mr. Melvin?

14 A. Not that I recall, no.

15 Q. Did you have any other discussions, other than Mr. Melvin
16 looking to turn his life around, regarding any benefits that he
17 might seek or be entitled to as a result of his cooperation?

18 A. No.

19 Q. Did Mr. Melvin, during the term of his cooperation --
20 withdrawn.

21 Approximately how long did you work with Mr. Melvin
22 and the ATF in connection with your law enforcement activities?

23 A. I think the initial investigations that we worked with him
24 were six to eight months, approximately. And I don't think we
25 did much work with him after that, after the initial arrests

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Campbell - Direct

1 were made where he was, as I say, burned or might be known that
2 he was utilized after that.

3 Q. Did you have any involvement in the investigation of David
4 St. John and Mr. Donald Roth?

5 A. Yes.

6 Q. And was it after that particular investigation that you
7 didn't use Mr. Melvin very much?

8 A. That's correct.

9 Q. Now, during the time that you did use Mr. Melvin, did he
10 ever request of you any financial assistance?

11 A. Yes.

12 Q. And how frequently did he request financial assistance?

13 A. I couldn't say.

14 Q. Did he indicate what that financial assistance was for?

15 A. To pay his bills and rent.

16 Q. And when those requests were made, what, if anything, did
17 you do?

18 A. I didn't pay anything to him, but I did meet with Special
19 Agent Boss, who, at times, gave him money for subsistence, or
20 if we were to do a drug purchase, he was doing -- buying guns
21 and drugs for us at the time, and at that time, we would -- he
22 would give him money.

23 Q. Other than monies that were paid in connection with actual
24 investigations like buy money and things of that nature, was it
25 Mr. Melvin that would request monies from you or would you

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Campbell - Direct

1 offer monies to him? How did that work?

2 A. He wouldn't normally ask me for any money unless Agent Boss
3 wasn't around because he knew we don't have significant funds
4 to pay informants.

5 Q. During any of your conversations with Mr. Melvin, did he
6 ever express to you that he expected that the government would
7 provide him with these subsistence payments in view of the work
8 that he was doing?

9 MR. ALLEE: Objection. That's vague as to time period
10 and as to work that he was doing.

11 THE COURT: I think you need to clarify your question,
12 Mr. Marinaccio. Perhaps you can rephrase it.

13 MR. MARINACCIO: I'll try, Judge, yes.

14 Q. Your initial conversation with Mr. Melvin about him wanting
15 to change his lifestyle, that led to him becoming a cooperator;
16 is that correct?

17 A. Yes.

18 Q. That's information that you forwarded over to the federal
19 authorities, and you began working jointly with them on a
20 number of cases; is that correct?

21 A. That's correct.

22 Q. How soon after you had this initial encounter with
23 Mr. Melvin did the topic of monetary compensation for
24 subsistence come up?

25 A. I don't recall it ever coming up. As a normal course of

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Campbell - Direct

1 business, whenever we do drug buys, we compensate the informant
2 in some way, but I don't recall any specific conversations that
3 he requested a specific amount.

4 I think that's the question you're asking.

5 Q. Well, how soon after he began cooperating in the joint
6 investigation that you were involved in was he advanced the
7 first payment?

8 A. I don't recall.

9 Q. Well, was it within a matter of weeks, months?

10 MR. ALLEE: Objection. Lacks foundation with this
11 witness.

12 THE COURT: He said he didn't recall. Put your next
13 question.

14 Q. Chief Campbell, I'm going to show you what has been marked
15 as Petitioner's Exhibit 11-A.

16 THE COURT: I already have it.

17 MR. MARINACCIO: I want to show it to the witness.

18 THE COURT: Yes.

19 Q. I ask you if you've ever seen that document.

20 A. I don't recall ever seeing this.

21 Q. Are you aware of how much monies were paid to Mr. Melvin
22 during the course of his cooperation with the Federal
23 Government and with your participation in those investigations?

24 A. I met with him frequently as a witness turning over some
25 monies, but I don't know what the total was.

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Campbell - Direct

1 Q. Now, were you present when a payment of \$5,000 was made to
2 Mr. Melvin on or about February 21st, 2004?

3 A. I don't specifically recall the actual incident. I do have
4 a vague recollection of Andy calling me saying -- sorry --
5 Agent Boss calling me saying I needed to meet up with
6 Mr. Melvin to give him a payment, but I don't specifically
7 recall the details or even where we met with him.

8 Q. I'm going to show you what has been marked in evidence as
9 Petitioner's Exhibit 1 and ask you if you recognize that
10 document?

11 A. I don't recognize the first several pages, the application
12 for public voucher for reward. However, the last page is a
13 typical form that we filled out when paying informants.

14 Q. When you say we, who are you talking about?

15 A. Myself and Special Agent Boss.

16 This is an ATF form, not a City of Newburgh form.

17 Q. And I think you testified that the City of Newburgh or the
18 Town of Newburgh made no payments to Mr. Melvin; is that
19 correct?

20 A. Not that I recall.

21 Q. It is possible that additional payments were made other
22 than payments that were made by the ATF?

23 A. It's possible, but I don't recall any. If he was working a
24 different case, I don't recall any.

25 Q. Was it the practice of the City of Newburgh to pay

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Campbell - Direct

1 informants who were cooperating with them?

2 A. Yes.

3 Q. Did you at any time discuss that particular practice with
4 Mr. Melvin?

5 A. I'm sorry. In regards to just what the City of Newburgh --

6 Q. Payment for compensation for work that they were doing for
7 law enforcement.

8 A. I don't recall.

9 Q. Did you ever have a conversation with Mr. Melvin approached
10 you and discussed, listen, I want, you know, some payment, you
11 know, I've been working for you guys, you know, quite
12 effectively, something like that?

13 A. I believe so. He constantly complained about money, and it
14 wasn't -- on a fairly regular basis. He was always complaining
15 about money, how he needed money.

16 Q. And when he asked for money, was there ever an occasion
17 where, to your knowledge, either you or the ATF said no?

18 A. Oh, yeah.

19 Q. Now, this \$5,000 payment, did you have any involvement --
20 the \$5,000 payment that's referred to in Petitioner's Exhibit
21 1, did you have any involvement whatsoever in preparing that
22 form?

23 A. No.

24 Q. Did you have any discussion with Agent Boss concerning this
25 particular payment?

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Campbell - Direct

1 A. Not that I recall. I'm sure I had a conversation. I don't
2 remember the substance of the conversation.

3 Q. Did you ever have a conversation with Agent Boss in which
4 the payment of a reward to Mr. Melvin was discussed?

5 A. Not that I recall, no.

6 Q. How is it this you came to sign this particular form as a
7 witness?

8 A. As I recall, and like I say, I only vaguely recall him
9 calling me and asking me to meet with him. As a normal course
10 of business, whenever we're giving money to an informant,
11 whether it be for a drug buy or subsistence, to have somebody
12 with you as a witness, to sign as a witness, count the money
13 and make sure it's the proper money and make sure it's going,
14 obviously, where it's supposed to go.

15 Q. Okay. In this particular case, the \$5,000 was to go to
16 Mr. Melvin?

17 A. Correct.

18 Q. Did you have any conversation with Mr. Melvin before this
19 payment was made about this particular payment that's reflected
20 in Petitioner's Exhibit 1?

21 A. Not that I recall.

22 Q. Did you arrange for Mr. Melvin to be present at the meeting
23 in which he was provided with the money?

24 A. I just don't remember the circumstances. Like I said, I
25 don't even remember specifically where we met. It was nine

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1 years ago. And we met with him on multiple occasions, so it's
2 difficult to select -- figure out which one of those times this
3 particular payment was.

4 Q. When you say you met with him on several occasions, was
5 that several occasions in which monies were advanced to him?

6 A. Yeah, monies, drug buys, gun purchases.

7 Q. Again, putting aside the monies that were given in
8 connection with what I would call drug purchases, gun
9 purchases, things of that nature, monies for Mr. Melvin's use,
10 did you have several of those kinds of meetings with

11 Mr. Melvin, where monies were advanced to him for his use?

12 A. Most of the money that was given to him was at the end of a
13 deal that had gone down, a successfully completed deal. It
14 wasn't a normal course of business just to give him money
15 because he either asked for it or said he needed it. That's
16 why he was told no frequently. And he complained a lot about
17 not getting money.

18 Q. Did you discuss with any members of the U.S. Attorney's
19 Office these cash payments that had been paid to Mr. Melvin
20 over the course of his cooperation?

21 A. I don't recall any discussions specific to cash payments.

22 Q. Did you have any discussion with Mr. Melvin concerning what
23 likely benefit he would receive as a result of his cooperation
24 if it was deemed to be successful?

25 A. I think, at the time that I spoke with him, he was more

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1 concerned with his charges, it wasn't -- not in regards to any
2 type of monetary advancement or compensation.

3 Q. So, during the period of his cooperation, he had charges
4 pending against him that he, in effect, was working off as
5 well; is that correct?

6 A. Yes.

7 Q. And that was in addition to payments that he was receiving?

8 A. Yes.

9 Q. And have you ever seen an agreement between the
10 government -- and by government, I use that term, you know,
11 broadly, not only the United States Government, District
12 Attorney's Office, police department, Town of Newburgh, City of
13 Newburgh -- have you ever seen any agreement that reflects the
14 understandings between law enforcement and Mr. Melvin
15 concerning what benefits he would receive as a result of his
16 cooperation?

17 A. I don't recall ever seeing any document like that.

18 Q. Do you recall ever seeing any document between any
19 government entity and Mr. Melvin that reflected that, in
20 connection with his cooperation, he could expect to receive
21 monetary payments?

22 A. No.

23 Q. But monetary payments were made as a matter of course over
24 the period of time of his cooperation?

25 A. Yes.

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1 MR. MARINACCIO: Just give me one moment, your Honor.

2 (Pause)

3 Q. Do you know where Mr. Melvin was living at the time that
4 the payment of \$5,000 that's reflected in Petitioner's 1 was
5 made?

6 A. I don't know.

7 MR. MARINACCIO: One moment.

8 (Pause)

9 Q. Do you know if Mr. Melvin was ever sentenced in connection
10 with the original charges that were brought against him that
11 led to his cooperation?

12 A. Yes.

13 Q. Do you know when that was?

14 MR. ALLEE: Objection to the relevance.

15 THE COURT: Overruled.

16 Q. Do you know when that was?

17 A. I don't recall the date, no.

18 Q. Do you know if he received a lesser sentence than he might
19 otherwise have received as a result of his cooperation?

20 A. Yes.

21 Q. And the answer to that is that he did receive a lesser
22 sentence than he might otherwise have received?

23 A. I believe so, yes.

24 MR. MARINACCIO: Thank you, your Honor. I have
25 nothing else.

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Campbell - Direct

1 Thank you, Deputy Chief.

2 THE COURT: Thank you.

3 Mr. Allee.

4 MR. ALLEE: No questions, your Honor.

5 THE COURT: Mr. Campbell, did you ever observe any
6 communication with Mr. Melvin and any law enforcement or
7 prosecutorial personnel that might have been described as a
8 wink and a nod, along the lines of, no, you're not going to get
9 any money, if you understand what I'm saying, where words might
10 be one thing, but actions might imply something else? Did you
11 ever observe anything like that?

12 THE WITNESS: No, ma'am.

13 THE COURT: Thank you.

14 Anything else, Mr. Marinaccio?

15 MR. MARINACCIO: Just to follow up.

16 Q. But there were occasions when Mr. Campbell -- sorry, you're
17 Mr. Campbell -- when Mr. Melvin asked for money where you
18 either said yes or no?

19 A. Correct.

20 MR. MARINACCIO: Thank you.

21 THE COURT: Mr. Allee, anything else?

22 MR. ALLEE: No.

23 THE COURT: Thank you.

24 You may step down, sir. You're excused.

25 (Witness excused)

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Colton - Direct

1 THE COURT: Mr. Marinaccio, will we have Mr. Colton?

2 MR. MARINACCIO: We have Mr. Colton.

3 THE COURT: Thank you.

4 Thank you, Mr. Allee.

5 GLENN COLTON,

6 called as a witness by the Defendant,

7 having been duly sworn, testified as follows:

8 THE DEPUTY CLERK: Please be seated and state and
9 spell your name for the record.

10 THE WITNESS: Glenn Colton. G-L-E-N-N, C-O-L-T-O-N.

11 THE COURT: Go ahead, Mr. Marinaccio.

12 DIRECT EXAMINATION

13 BY MR. MARINACCIO:

14 Q. Good afternoon, Mr. Colton.

15 A. Good afternoon.

16 Q. You and I have never spoken before today, correct?

17 A. That's correct.

18 Q. How are you currently employed, sir?

19 A. I work at a law firm, Dentons U.S., LLP.

20 Q. And how long have you been so employed?

21 A. Well, the firm name has changed a few times, but I've been
22 with the firm since April of '09.

23 Q. And prior to that, were you with the United States
24 Attorney's Office in the Southern District of New York?

25 A. There was an intervening firm, but, yes, prior to that, I

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Colton - Direct

1 was with the U.S. Attorney's Office.

2 Q. And just skipping right back to when you were a U.S.
3 Attorney, when were you a United States Attorney?

4 A. I was an Assistant United States Attorney.

5 Q. Assistant United States Attorney.

6 A. From 1995 to 2004.

7 Q. And in connection with your duties as an Assistant United
8 States Attorney, were you involved in the prosecution of David
9 St. John and Mr. Donald Roth?

10 A. Yes.

11 Q. Were you involved in the investigation into Mr. St. John
12 and Mr. Roth as it was going on?

13 A. Yes.

14 Q. In connection with your involvement in the investigation,
15 did you have occasion to meet with and interview a person by
16 the name of Charles Flip Melvin?

17 A. Yes.

18 Q. And how frequently, in connection with the investigation of
19 Mr. St. John and Mr. Roth, would you say you met with
20 Mr. Melvin?

21 A. It's hard to answer the question as asked because
22 Mr. Melvin was involved in a very substantial number of cases
23 and investigations that were going on, so to answer it in
24 connection with just that one case is hard to answer.

25 Q. Okay. Then let me try it this way.

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1 When did you first become introduced to Mr. Melvin?

2 A. It would have been early in 2002, I believe.

3 Q. And there came a point when Mr. Melvin entered into a
4 cooperation agreement with the government; is that correct?

5 A. Yes.

6 Q. Mr. Colton, I'm going to show you what has been marked as
7 Petitioner's Exhibit 2 for identification and ask you if you
8 recognize that document.

9 A. I don't specifically recall the precise document, but it
10 does appear to be in the form of what the cooperation agreement
11 would have been. It has my name on it, but it was signed, I
12 believe, by Terry Pesci, not by me.

13 Q. Well, could you tell us if this was the cooperation
14 agreement entered into between the government and Mr. Charles
15 Melvin?

16 A. Ten years later, I can't tell you this was the precise
17 agreement, but I have no reason to doubt it is.

18 MR. MARINACCIO: Your Honor, I offer it into evidence.

19 MR. ALLEE: No objection, your Honor. We're prepared
20 to stipulate based on counsel's representation.

21 THE COURT: I don't mean to put myself in a -- I
22 definitely don't mean to put myself into a position of a
23 witness, but I can tell you that the handwriting on the upper
24 right-hand corner of the first page is my handwriting, and I
25 can tell you that I was the judge who took Mr. Melvin's guilty

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Colton - Direct

1 plea at the time that the cooperation agreement was provided to
2 the Court. I don't have any recollection of it. I can tell
3 you that only based on recognizing my own handwriting and
4 checking my records, which show that I did, indeed, preside the
5 entry of the guilty plea, for whatever that's worth.

6 But based on the government's stipulation, I'll
7 receive Petitioner's 2.

8 MR. MARINACCIO: Your Honor, just so that the record
9 is abundantly clear, there is a section of the trial transcript
10 where the agreement is referred to by the 3500 number, and
11 there's a stipulation during the trial that this is, indeed,
12 the cooperation agreement.

13 THE COURT: Well, between that stipulation and this
14 one, I think we're on solid ground. So Petitioner's 2 is
15 received, and it's five pages.

16 (Petitioner's Exhibit 2 received in evidence)

17 Q. Now, Mr. Colton, this agreement was entered into between
18 the government and -- withdrawn.

19 This agreement was apparently signed by Mr. Melvin on
20 January 22nd, 2003, correct?

21 A. That's the date on the document. I can't tell you I
22 independently recollect the date.

23 Q. So there was a period of time when Mr. Melvin was
24 cooperating without the benefit of a cooperation agreement,
25 correct?

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Colton - Direct

1 A. There was a time he was providing assistance to law
2 enforcement under a different agreement than this one.

3 Q. Okay. There was a distinct and separate agreement than the
4 one that we have here?

5 A. I can't tell you whether it was a written agreement at this
6 point, this many years later, but the government agreed to
7 recommend to the magistrate, I believe it was Magistrate Fox at
8 the time, that Mr. Melvin be released on bail for the express
9 purpose of aiding law enforcement in investigations.

10 Q. Other than the agreement to have Mr. -- withdrawn.

11 And Mr. Melvin was released soon after his arrest in
12 order to be allowed to cooperate with the government, correct?

13 A. He was released after his arrest. I don't remember how
14 much time. My guess is it wasn't that long because you would
15 lose the efficacy of his ability to be a CI if he's in the
16 system for a long period of time.

17 Q. And people on the street would know that and perhaps
18 suspect once he got released, correct?

19 A. That's a fair assumption.

20 Q. Okay. And so, in order to avoid that, you want to move as
21 quickly as possible?

22 A. Another fair assumption.

23 Q. Okay. Regarding the benefits that Mr. Melvin could expect
24 to receive as a result of his cooperation, was there any other
25 agreement between the government and Mr. Melvin other than the

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Colton - Direct

1 agreement that's reflected in Petitioner's Exhibit 2?

2 A. As of the time he entered into a cooperation agreement as
3 opposed to an agreement to be released on bail for working on
4 the street, the only benefits he was to expect were either in
5 this agreement or any payments, CI payments, made by ATF, which
6 would have been documented by ATF at the time.

7 Q. And if they were documented by ATF at the time, they would
8 have also been disclosed to Mr. Roth's attorney during the
9 course of the trial, correct?

10 A. It would have been my practice and the practice of the
11 Office to request any information about any benefits, including
12 payments, aggregate those and include them in the production at
13 the time the 3500 and Giglio material was produced to the
14 defense.

15 Q. And it wasn't only your practice, but it's also the policy
16 of the United States Attorney's Office, isn't it?

17 A. Yes.

18 Q. I'm going to show you what has been marked as Petitioner's
19 Exhibits 11-A and 11-B.

20 For the record, Mr. Colton, the first to pages of that
21 document are 11-A and all the remaining pages are 11-B.

22 A. Okay.

23 Q. Do you recognize 11-A?

24 A. I don't specifically remember this document, but it
25 wouldn't surprise me that we produced a document that listed

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Colton - Direct

1 the payments. And it would have been our practice to produce a
2 document or some other proof of the payments so they would be
3 available to the defense.

4 Q. Well, the number --

5 A. Look, I'll add that I have no reason to doubt that this is
6 what was produced as 3502-Z and 3502-U.

7 Q. Okay. And the 3502-Z and the 3502-U numbers that appear on
8 the exhibits, those were the 3500 numbers that were assigned to
9 the case -- the prosecution of Mr. Roth and Mr. St. John; isn't
10 that correct?

11 A. It's not exactly accurate. In every case --

12 Q. Correct me.

13 A. In every case that I ever was the AUSA on, we produced 3500
14 material, and 3501 would have been one witness, 3502 another
15 witness, et cetera.

16 I presume, based on the document in front of me, that
17 3502 dash various letters were the materials that were the
18 Giglio or 3500 material related to Charles Melvin.

19 Q. Okay. Were you aware, Mr. Colton, of any other payments
20 made to Mr. Melvin -- and I'm talking now during the course of
21 the trial of Mr. Roth and Mr. St. John. Were you aware of any
22 other payments made to Mr. Melvin other than those reflected in
23 Petitioner's Exhibit 11-A?

24 A. I can't tell you, ten years later, that I remember all the
25 payments. What I can tell you is that it was my practice and

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Colton - Direct

1 the Office's practice to request the information about any
2 payments that were made prior to testimony or any promises of
3 payment made or any other promises of benefits. To the extent
4 we received information about any promised or actual benefits,
5 they were turned over to the defense. That's my recollection,
6 but I can't tell you I remember every single payment.

7 I will tell you that my habit was, if I knew at any
8 point in time prior to Mr. Melvin finishing his testimony of
9 any payments or, frankly, any -- if I learned ever that he was
10 promised something that we didn't disclose, we would have
11 disclosed it.

12 Q. Well, how about if you had found out that a payment had
13 been made prior to the conclusion of the trial? Would you have
14 disclosed that as well?

15 A. In an exercise of caution, I probably would, but I have no
16 recollection of learning that fact. And I don't know that that
17 ever happened. I just don't know one way or another.

18 Q. I'm going to show you what has been marked in evidence as
19 Petitioner's Exhibit 1 in evidence.

20 Do you recognize that document, Mr. Colton?

21 A. I do not.

22 Q. Have you ever seen that document before today?

23 A. I don't have any recollection of seeing this document prior
24 to you handing it to me.

25 Q. Do you have any present recollection of when the trial in

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Colton - Direct

1 this matter, meaning the matter of David St. John and Donald
2 Roth, do you have any recollection now as to when that trial
3 commenced and when it concluded?

4 A. I can't tell you the exact dates, but I do remember that it
5 started either late November or early December of 2003 and it
6 was planned that it would only go a couple of weeks. It ended
7 up going all the way somewhere around early to mid-February.
8 But I can't tell you precisely. And of course, there was a
9 break for the holidays in between.

10 Q. At any time after early January of 2003 to the conclusion
11 of the trial, were you ever advised by Agent Boss that
12 paperwork for the payment of a \$5,000 reward for Mr. Melvin had
13 been begun to be produced?

14 A. Not that I recall.

15 Q. Were you ever told by Mr. Boss at any time before the
16 conclusion of the trial that the payment of a \$5,000 reward to
17 Mr. Melvin had been approved?

18 A. Not that I recall.

19 Q. Had you ever been told at any time by Agent Boss that a
20 \$5,000 reward had actually been paid to Mr. Melvin?

21 A. Not that I recall.

22 Let me just add my answers to your last three
23 questions are referring to a time period after the time period
24 in which we produced the list of payments. I didn't study the
25 list of payments or remember whether there might have been a

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1 5,000 that I did know at the time that was disclosed. I'm
2 interpreting your question to mean a \$5,000 payment or promise
3 or paperwork that wasn't disclosed, and the answer is no, I
4 don't recollect that.

5 Q. Well, had you been advised that a payment of \$5,000 was, to
6 use the colloquial, in the works as early as January of '03,
7 would you have disclosed that information to the attorneys for
8 Mr. Roth and Mr. St. John?

9 MR. ALLEE: Objection. It's compound, it's got the
10 wrong date, and it calls for a speculative answer.

11 THE COURT: I'll allow it as it stands if the witness
12 is able to answer.

13 A. I mean, I understand the mistake in the dates, but the
14 general practice and the cautious practice that we would have
15 followed, myself and AUSA now the Honorable Cathy Seibel who
16 tried the case with me, would have been to exercise caution and
17 disclose either a potential payment or an actual payment or
18 anything we may have learned about.

19 Q. You recall the examination of -- withdrawn.

20 You conducted the examination of Agent Boss at the
21 trial of Mr. St. John and Mr. Roth, correct?

22 A. I believe so, yes.

23 Q. I believe you also conducted the examination of Mr. Melvin.

24 A. That's correct.

25 Q. Do you recall questioning Mr. Boss, Agent Boss, regarding

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Colton - Direct

1 the benefits that Mr. Melvin may have been promised as a result
2 of his cooperation?

3 A. I don't recall that. I don't dispute it if you have the
4 transcript. I just don't recall it. It would certainly have
5 been our practice to bring out in direct of the cooperator the
6 benefits we knew about, but I don't recall whether that was
7 also brought out through the case agent, Mr. Boss.

8 Q. Well, how about with the cooperator? Do you recall
9 eliciting testimony from Mr. Melvin regarding his obligations
10 pursuant to the cooperation agreement and the government's
11 obligations pursuant to the cooperation agreement?

12 A. I don't --

13 MR. ALLEE: Objection, your Honor, again, to
14 recollections of testimony. We have a transcript available to
15 the Court.

16 THE COURT: I'll allow this question.

17 If you can answer it.

18 A. I don't have a specific recollection of the specific
19 questions and answers, but it would have been my practice and
20 the practice of the Office to, on direct examination, bring out
21 from a cooperator what he expected or she expected, what he or
22 she was promised, and to go over the cooperation deal, if you
23 will.

24 Q. To your knowledge, as you sit here today, were there any
25 promises made to Mr. Melvin in connection with his cooperation

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Colton - Direct

1 that were not included in his cooperation agreement?

2 A. I will answer it this way. I know of no promises or
3 benefits or recollect no promises or benefits that weren't
4 either in the cooperation agreement or otherwise disclosed in
5 the 3500/Giglio material.

6 MR. MARINACCIO: May I have a moment, Judge?

7 THE COURT: Yes, sure.

8 MR. MARINACCIO: Just let me have one moment, your
9 Honor.

10 THE COURT: Sure.

11 (Pause)

12 Q. By the way, Agent Boss was present during most of the
13 testimony in the case of Donald Roth and David St. John,
14 correct?

15 A. Yes.

16 Q. And they were considered part of the prosecution team?

17 A. When you say they, who are you referring to?

18 Q. I'm sorry. He was considered part of the prosecution team?

19 A. Yes. It was typical to have the case agent be at counsel
20 table with the government team during a trial.

21 Q. I'm going to show you what has been marked for
22 identification as Petitioner's Exhibit 13.

23 Have you ever seen that document or a similar document
24 before?

25 MR. ALLEE: Objection. Relevance.

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Colton - Direct

1 THE COURT: Overruled. I'll allow it briefly. I
2 think that it is arguably relevant, and I'll allow it in the
3 interest of assuring full and fair opportunity for Petitioner
4 to pursue the issue that he has raised that is pertinent to
5 this hearing.

6 A. Can you reask the question, please, or have it read back.

7 Q. Are you familiar with that document?

8 A. I've seen what is colloquially called the Ogden memo, which
9 was issued years after I left the U.S. Attorney's Office.

10 Q. Was there a similar type of memo in existence when you were
11 in the U.S. Attorney's Office regarding guidance for
12 prosecutors regarding discovery?

13 A. I don't recall.

14 Q. Take a look at page six, paragraph seven.

15 I just ask you if there was -- if you were aware of a
16 similar direction --

17 THE COURT: Excuse me, Mr. Marinaccio. The document
18 is not in evidence.

19 MR. MARINACCIO: I'm not asking him to read the
20 document.

21 THE COURT: Well --

22 MR. MARINACCIO: I'm just asking if there was a
23 similar provision in any document that he was familiar with
24 when he was in the U.S. Attorney's Office.

25 THE COURT: But how could a reviewing court know what

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Colton - Direct

1 that means since the document is not in evidence? There's
2 nothing for it to be similar to because it's not in evidence.

3 MR. MARINACCIO: Your Honor, then I would offer
4 Petitioner's 13 in evidence.

5 MR. ALLEE: That's fine, your Honor. No objection. I
6 mean, I object on relevance grounds, but --

7 THE COURT: Absolutely, you may, and I'm sustaining
8 the objection.

9 MR. ALLEE: If he wants to ask the question about the
10 Ogden memo, he can refer to this document.

11 THE COURT: Seems to me if he wants to ask about the
12 subject matter that's identified in the paragraph he
13 referenced, he can ask about the subject matter, but I'm
14 sustaining an objection to a memo that's dated 2010, after
15 Mr. Colton left the office and long after this trial was
16 concluded.

17 Q. In 2003 and 2004, when you tried this case, was there a
18 policy in the U.S. Attorney's Office that discovery, including
19 discovery of payments made to a cooperator, was a continuing
20 obligation on the part of prosecutors?

21 A. I can't tell you --

22 MR. ALLEE: Objection to the form of that question.

23 THE COURT: Overruled.

24 You can answer the question.

25 A. I can't tell you whether there was a written policy from my

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Colton - Cross

1 recollection this many years back, but I will tell you that it
2 was my understanding and my practice and the practice of the
3 Office, to my knowledge, to turn over benefits to a government
4 witness and that, if you learned of benefits after you made the
5 3500 or Giglio presentation, in an exercise of caution, you
6 would augment that Giglio or 3500 production.

7 Q. You prepared an affidavit in connection with this petition
8 by Mr. Roth?

9 A. I assume it was a declaration, but, yes.

10 Q. A declaration.

11 I'm going to show you what has been marked for
12 identification as Petitioner's Exhibit 16.

13 Is that the declaration you prepared in connection
14 with this matter?

15 A. It appears to be, yes.

16 MR. MARINACCIO: I offer it into evidence, your Honor.

17 MR. ALLEE: No objection, your Honor.

18 THE COURT: Petitioner's 16 is received.

19 (Petitioner's Exhibit 16 received in evidence)

20 MR. MARINACCIO: I have no further questions.

21 THE COURT: Mr. Allee.

22 MR. ALLEE: Yes, your Honor, briefly.

23 CROSS-EXAMINATION

24 BY MR. ALLEE:

25 Q. Good afternoon, Mr. Colton.

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Colton - Cross

1 A. Good afternoon.

2 Q. You were one of the AUSAs who prosecuted Donald Roth?

3 A. One of the AUSAs who handled the prosecution for the
4 government of Donald Roth.

5 Q. And there were other AUSAs who participated in the handling
6 of the prosecution?

7 A. Yes.

8 Q. All right. And you described you were one of the AUSAs who
9 tried the case.

10 A. That's right.

11 Q. Can you describe your role with respect to the witness
12 Charles Melvin.

13 A. Myself and then AUSA Cathy Seibel divided the government
14 witnesses. I was primarily responsible for Mr. Melvin and a
15 bunch of other witnesses. AUSA Seibel had other witnesses.
16 And we often worked together in some of the preparation
17 sessions, strategy issues, et cetera, as to all of the
18 witnesses.

19 Q. And you ended up doing the direct of Charles Melvin?

20 A. That's correct.

21 Q. Did you prepare, prior to his testifying, with Charles
22 Melvin?

23 A. I'm sure we did.

24 Q. Generally speaking, what type of preparation did you do?

25 A. I can't tell you I remember the prep sessions, but my

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Colton - Cross

1 practice would have been to meet with the witness, go over the
2 types of questions that would be asked, give them basic
3 instructions like tell the truth, listen to the question, think
4 about your answer and things of that nature.

5 Q. And as Melvin was the witness that you were going to put on
6 the stand, you were mainly the person handling the preparation
7 of Melvin in advance of trial?

8 A. I would say with primary responsibility, but, as practice,
9 what would typically happen is the other AUSA would play the
10 mock cross, if will you, and ask questions and help in
11 preparing the witness to understand the questions that he or
12 she would be asked and make sure that they understand their
13 obligations, understand the questions that are being asked, and
14 give accurate answers to the Court.

15 Q. And in those types of preparation sessions with a witness,
16 and, here, a cooperating witness, is it just yourself, the AUSA
17 and the witness, or were there ordinarily others present?

18 A. It was my practice and the practice of the Office not to
19 meet with witnesses without a nonlawyer present, typically a
20 law enforcement officer. So, in the case of Melvin, it would
21 have been Agent Boss, Detective Campbell or potentially one of
22 the Office's investigators if neither Agent Boss nor Detective
23 Campbell were available.

24 Q. During the prep sessions, do you recall discussion of any
25 kind -- the prep sessions with Melvin, do you recall discussion

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Colton - Cross

1 of any kind that you took part in or that you heard about
2 making a future payment to Melvin after he testified?

3 A. I have no recollection of that.

4 Q. And do you recall -- my first question was about whether
5 you recalled discussion of any kind. Do you recall implication
6 of any kind, whether or not it was discussed, any implication
7 in any way that Melvin would be given money in the future,
8 following his testimony?

9 A. No.

10 Q. The other limitation on my question, which I'll elaborate
11 on, forget money, just any kind of compensation in any form in
12 the future, any promise of any benefit following his testimony,
13 do you recall discussion of that with Melvin in the prep
14 sessions leading up to his testimony at the trial of Donald
15 Roth?

16 A. When you say any benefit, I'm sure we discussed the
17 possibility, if he met all of his obligations under the plea
18 agreement, to get a 5K letter from the government at the
19 sentencing phase.

20 Q. And you recall, in the prep sessions, discussion of what we
21 refer to as a 5K?

22 A. I don't tell you I remember those discussions, but I'm sure
23 we had them.

24 Q. All right. And why do you say you're sure that you had
25 them?

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Colton - Cross

1 A. Because it was our pattern and our practice with every
2 cooperator to review, again, in preparation and then actually
3 during direct examination the plea agreement and the benefits
4 and obligations for both the cooperator and the government.

5 Q. And it was your practice, in preparing a witness in
6 Melvin's position, to talk about -- preparing him to testify
7 about the 5K -- the potential of a 5K letter?

8 A. Yes.

9 Q. After Melvin testified at the trial of Donald Roth, do you
10 recall any discussion with Agent Boss about a payment made to
11 Melvin after his testimony?

12 A. I do not recall any discussion like that.

13 Q. And now not to limit the question to Agent Boss, with
14 anyone from ATF or law enforcement about making a payment to
15 Melvin after his testimony. Do you recall any such discussion?

16 A. I do not recall any such discussion.

17 Q. And the allegation of such a payment came to your attention
18 in connection with this habeas proceeding?

19 A. I learned from either you or an ATF supervisor that there
20 was such an allegation being made. I don't know, frankly, if a
21 payment was ever made or not.

22 MR. MARINACCIO: No further questions.

23 THE COURT: Mr. Marinaccio.

24 MR. MARINACCIO: No questions.

25 THE COURT: Mr. Colton, in addition to the list of

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Colton - Cross

1 subsistence payments that were incorporated in 3500 material
2 that came from ATF apparently during the course of Mr. Melvin's
3 cooperation, would it also be fair to say that there would have
4 been some payments that would have had to be made in order for
5 Mr. Melvin to be present and testify; that is to say travel
6 expenses, hotel, food, that sort of thing?

7 THE WITNESS: It's possible. I can't recall, your
8 Honor, whether he was living in the area, whether he was
9 working. I don't recall. I have a vague recollection that he
10 was working in some type of job at that time, but I won't swear
11 to it under oath because my recollection is not good enough.
12 But it's possible, but possibly not, that such payments would
13 have needed to be made.

14 THE COURT: Well, assuming for the moment that there's
15 been testimony that he was living in Virginia at the time of
16 his testimony. Would I be correct in saying that it would have
17 been the U.S. Attorney's Office that would have arranged for
18 his travel rather than the ATF, that that would have been the
19 normal course with regard to a witness who was being called
20 upon to testify?

21 THE WITNESS: Yes. The normal course of practice,
22 through Wendy Olsen's office, the victim witness coordinator
23 would have coordinated travel and the logistics.

24 THE COURT: And so my question is -- and I know you
25 don't have any specific recollection about how Mr. Melvin's

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Colton - Cross

1 circumstance was handled, but my question is, in the ordinary
2 course of the procedures that you followed, would there have
3 been any additional information provided to defense counsel in
4 the criminal case about those additional travel payments or
5 would that have just been inferred, that they would be
6 recognizing that that had to have been made?

7 THE WITNESS: I don't have a specific recollection,
8 but I -- sitting here today, I would guess that there was a
9 difference between repaying an out-of-pocket expense versus
10 giving a benefit like cash which somebody could use for
11 whatever they chose to use it for.

12 THE COURT: All right.

13 With regard to your conversations with Mr. Melvin
14 during the investigation and prosecution of the case, and
15 particularly prior to and during his testimony, were there any
16 occasions when now Judge Seibel had worked with Mr. Melvin, but
17 you were not present?

18 THE WITNESS: I don't recall that, but it's certainly
19 possible.

20 THE COURT: All right. Thank you.

21 Anything else, Mr. Allee?

22 MR. ALLEE: No, your Honor.

23 THE COURT: Mr. Marinaccio?

24 MR. MARINACCIO: No, your Honor. Thank you.

25 THE COURT: Thank you.

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1 You may step down, sir.

2 THE WITNESS: Thank you, your Honor.

3 THE COURT: You're excused.

4 (Witness excused)

5 THE COURT: Mr. Marinaccio, what's your pleasure?

6 MR. MARINACCIO: Your Honor, the additional witness
7 that I would have liked to call is Mr. Melvin. I've indicated
8 on the record already that, in my conversation with his
9 counsel, his counsel has indicated that he intends to have
10 Mr. Melvin invoke his Fifth Amendment privilege. His attorney
11 is not available and won't be available until next week
12 sometime. It is my position that, given the nature of these
13 proceedings, the examination of Mr. Melvin can be conducted
14 without him incriminating himself in any way.

15 THE COURT: Well, Mr. Marinaccio, the difficulty that
16 I have with that is that, despite any limitation on the subject
17 matter of direct examination of Mr. Melvin, in addition to the
18 scope of the direct examination, Respondent's counsel would be
19 entitled to inquire into issues relating to the witness'
20 credibility, and if Respondent's counsel were hampered in that
21 effort, then Respondent's counsel would be entitled to seek to
22 strike the testimony, and I think it's reasonable to assume
23 that that would include inquiry about currently pending charges
24 against Mr. Melvin for which he clearly would have a Fifth
25 Amendment right.

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1 So it seems to me an exercise in futility to make
2 further efforts along those lines, although I could, of course,
3 inquire of Mr. Allee whether he would intend to limit his
4 examination simply to what occurred in this case or whether he
5 would be seeking to make further inquiry into other matters
6 relating to Mr. Melvin's credibility.

7 MR. ALLEE: Mr. Melvin's credibility would be at
8 issue. We would ask questions that go to his credibility,
9 which includes conduct more recent than the -- conduct that is
10 recent and that is directly part of what he's now being
11 prosecuted for.

12 But I would add there are lots of reasons that I can
13 imagine Mr. Melvin and Mr. Vita, on Mr. Melvin's behalf, would
14 want to invoke the Fifth Amendment that are not even about
15 directly his pending charges or even about his credibility. I
16 mean, even for him to admit he was a cooperator or that he --
17 or if asked questions about whether he was paid and whether
18 that payment was disclosed, that might be something that could
19 be a link in a chain that the government would want to offer
20 against him in the criminal case. So it seems to me there's a
21 good basis, a substantial basis, for the invocation of the
22 Fifth Amendment on both the direct testimony that
23 Mr. Marinaccio would ask and certainly on our cross on the
24 events of this case and our cross of other matters about his
25 credibility.

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1 THE COURT: And is it fair to assume, Mr. Allee, that
2 your office is not interested in granting Mr. Melvin immunity?

3 MR. ALLEE: Yes, your Honor. We are prosecuting
4 Mr. Melvin now. And he's indicted. He actually has a trial.
5 I understand there's a trial scheduled for Mr. Melvin later
6 this month. And, yes, your Honor, to answer your question, we
7 have no intention to immunize him in this matter.

8 THE COURT: I'm inclined, Mr. Marinaccio, to move
9 forward without further pursuing the matter. I, of course, am
10 very familiar with Mr. Vita. I trust his judgment. I
11 certainly trust that you are fairly and accurately reporting
12 what he has said to you. I have no reason to doubt that. And
13 I think, rather than further telescoping the process, I'm
14 inclined to sustain Mr. Melvin's right to invoke his Fifth
15 Amendment privilege and not to go through an exercise in
16 futility by having him attend simply to invoke that privilege.

17 As I said, I don't think that it's appropriate where
18 credibility is the crucial issue for me to make some type of
19 effort to hamstring the U.S. Attorney's Office in their
20 examination of Mr. Melvin, and that would be the only prospect
21 under which he could be expected to testify, though, frankly,
22 if I were Mr. Vita, I still wouldn't let him testify even with
23 a limited scope.

24 MR. MARINACCIO: Your Honor, I think that this
25 highlights the prejudice that Mr. Roth is suffering as a result

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1 of the failure of the agents to promptly notify the government,
2 if that, indeed, is what ultimately is the Court's finding,
3 about this reward payment, because, clearly, in 2004, we would
4 not have been faced with this issue. We're faced with this
5 issue now because a cooperator has strayed back onto the bad
6 path that he had been walking prior to his cooperation
7 agreement, and now he becomes a witness who is unavailable to
8 Mr. Roth through no fault of Mr. Roth's, and, frankly, he's a
9 witness who can best shed light on, in a non-circumstantial
10 way, what his expectations were as he was proceeding here down
11 this course of cooperation. We've gotten a little glimpse,
12 through Agent Boss and through Deputy Chief Campbell, but
13 clearly the best evidence of what his expectations were, what
14 his desires were and what he believed the government was
15 prepared to do for him comes from him.

16 I think that, Judge, given the narrow issue, I think
17 the Court can restrict cross-examination under its general
18 powers to restrict cross-examination. There's certainly enough
19 material in the record as it stands, in the trial record, to
20 call into question Mr. Melvin's credibility on a slew of other
21 issues, including his prior bad acts, that it would certainly
22 be gilding the lily to go into any further collateral matters
23 when you have a witness who is crucial on this issue of what
24 was his expectation, what was his mind-set, and what he had
25 requested in connection with the ultimate payment of the

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1 reward, you know, to him.

2 So I would ask the Court to reconsider or at least
3 give me the opportunity to present further argument at a time
4 when Mr. Vita is available to state his position. But,
5 frankly, Judge, I'm an officer of the Court. I've stated it as
6 accurately as I can. I think the issue comes down to whether
7 or not it's a legitimate exercise of his Fifth Amendment
8 privilege and whether or not there is a way, short of immunity,
9 which I don't expect the government to award him, that we can
10 go with in order to get his vital testimony.

11 THE COURT: Mr. Allee.

12 MR. ALLEE: Well, the government's position is your
13 Honor has already ruled correctly that this is a proper
14 invocation of Fifth Amendment.

15 Mr. Vita, by the way, what Mr. Marinaccio is saying
16 about his availability, he's just out of the country this week,
17 but he's been very responsive. I've asked him what
18 Mr. Melvin's position is, and I know Mr. Marinaccio has.
19 Mr. Vita returns next week if the Court wants to hear from him.
20 But that's a proper invocation of the right.

21 To put it in context, I disagree with Mr. Marinaccio.
22 This is not some habeus petition and this hearing is not some
23 abstract inquiry into what were the raw thoughts or emotions or
24 expectations in Melvin's head. This is about a specific
25 instance of a payment of \$5,000 to Melvin after he testified,

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1 which arguably, at best, gives an implication or prompts some
2 further inquiry into whether there was an expectation of this
3 payment beforehand or whether that expectation was created from
4 a promise, whether there was a basis for it from the
5 government. You heard from the handling agent. You heard from
6 the handling AUSA, testimony from them. They already put in
7 affidavits. They were credible witnesses. There's no evidence
8 to the contrary that this is a payment that came -- that was
9 not even in anybody's mind's eye until after Melvin testified.
10 It is, therefore, definitionally, not impeachment. And that
11 not only is what they testified to, that makes a whole lot of
12 sense. For example, \$11,000 in payments were made to Melvin
13 before he testified, and that was all disclosed. There was all
14 kinds of other impeachment of Melvin. He's committed all kinds
15 of crimes prior to his testimony. That was all disclosed. He
16 was crossed on that. He was directed on that.

17 THE COURT: Do I recall that there was no cross about
18 the \$11,000 in payments?

19 MR. ALLEE: Yes, your Honor, which is something I
20 emphasized slightly in our brief to point out the immateriality
21 of this. The defense had \$11,000 in payments to someone now
22 Mr. Marinaccio would try to describe as a star witness,
23 Mr. Roth would, and they didn't even bother to cross on that.
24 They had so much other cross, they didn't even bother with the
25 \$11,000 in payments that were made. So the baseless assertion,

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1 the unproved assertion, that there was some promise of more
2 money to Melvin and to keep it quiet until after he testified,
3 there will be a reward, just doesn't square with common sense
4 under the circumstances.

5 There's another reason why it doesn't square with the
6 circumstances, which is Melvin was a key person in this
7 investigation. There's no dispute about that. He's the person
8 who was at the center of the charged allegations, the witness
9 that was allegedly attempted -- that was the subject of the
10 attempt at tampering. However, his testimony was not real
11 vital. There's a couple easy ways to explain how that is. The
12 first is it was recorded. What he did was recorded. There was
13 a head bob that wasn't recorded that he testified about, but
14 that's about it. It occupied very little of the summation
15 proportionately, discussion of his testimony, and even very
16 little of the transcript of the trial, at least the direct.

17 And don't take my word for it, Judge. Judge Robinson,
18 at our post-trial motion where Melvin was challenged on other
19 grounds, there was a Rule 33 motion that arose while the appeal
20 was pending, and Judge Robinson then addressed the claimed
21 error, the claimed problem, and then went on to sort of
22 prejudice analysis and pointed out -- summarized basically what
23 I'm -- I'm re-summarizing what Judge Robinson said in response
24 to that motion, that Melvin was not the star witness he was
25 made out to be by Mr. Roth.

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1 So, for those reasons, my first point is Mr. Vita's
2 telling me that his client would invoke the Fifth Amendment. I
3 have every reason to believe that that's in good faith and
4 there's a basis for his doing that. And second, we don't need
5 to hear from Mr. Melvin. There are ten reasons why the habeus
6 petition -- why the Petitioner has not met his burden and why
7 it should be denied.

8 MR. MARINACCIO: Your Honor, if I just may briefly
9 respond.

10 There are a number of strategic reasons why the
11 attorneys for Mr. Roth and Mr. St. John would not have gone
12 into subsistence payments, not the least of which it may have
13 raised the specter of, you know, a witness who had to be
14 relocated, threats, things of that nature, and so,
15 strategically, I can see why that would not be gone into in
16 view of the other materials, as well, that they had to go into.

17 But this is something different, your Honor. This is
18 a reward. And the context of this reward has to be viewed in
19 the context of the questioning of the witnesses and the
20 arguments made by the prosecution and the impression that was
21 left in the minds of this jury, and that is that the only
22 benefit -- the only benefit that Mr. Melvin could expect to
23 receive were the benefits that were outlined in the cooperation
24 agreement, to wit, the 5K letter. It is said over and over and
25 over and over again.

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1 Now, we've heard today from Deputy Chief Campbell that
2 Mr. Melvin was constantly asking for money and that it was
3 their practice to reward an informant whenever there was a
4 successful investigation or investigative technique, whether it
5 be a purchase of drugs or a purchase of guns or whatever, and
6 that he was constantly asking for money. So it really begs the
7 question as to what Mr. Melvin really thought he was going to
8 get over and above the cooperation agreement and whether or not
9 that information should have been made available to the
10 defense, who would have then been able to decide for themselves
11 whether or not, as a strategic matter, that was something that
12 should be put before the jury. And again, we can only find
13 that out through -- because I can't go into -- no one in this
14 room can go into the mind of Mr. Melvin. This is Mr. Melvin,
15 crucial testimony from him.

16 Short of that, your Honor, the other issue that we
17 have is the issue of Judge Seibel.

18 I would also request that, regardless of what the
19 Court's ruling is on Mr. Melvin or Judge Seibel, that I be
20 allowed to order the minutes of this hearing and be given a
21 period of time, at least 30 days, to make a written submission
22 to the Court.

23 THE COURT: Well, I want to point out, in carefully
24 reviewing Petitioner's Exhibit 1, and specifically the first
25 two pages, the application and public voucher for reward, I

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1 think it's important to recognize that, whether or not the
2 application for reward was listed under the St. John and Roth
3 case number, the substance of the section that says
4 justification for payment identifies on the second page the
5 successful prosecution of 13 defendants to date, and, as I read
6 this, that does not include Mr. St. John, et al., and Mr. Roth.
7 In fact, in the more lengthy paragraph under justification for
8 payment, it refers to 11 defendants who pled guilty or were
9 found guilty at trial. So that's the first 11 apparently in a
10 single case involving cocaine apparently having been completed
11 to its final end before the form was completed. Then in the
12 next paragraph, another separate person who, according to the
13 last line, had, by that date, already pled guilty. Then in the
14 next paragraph, a reference to yet another defendant who was
15 found guilty. So my reading is those are the 13 defendants
16 that are referenced in the second-to-last paragraph on the
17 second page.

18 And in addition to that, on the bottom paragraph of
19 the justification for payment on the first page, there's a
20 reference to a case that had not yet resulted in a plea and
21 then at the top of the second page, the then ongoing trial
22 involving Mr. St. John and Mr. Roth. And while it's clear that
23 Mr. Melvin's testimony in that case was a part of the
24 justification for the reward, in my view, it is, at best, a
25 modest part of the entire justification. And that's true even

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1 though the application was apparently put in under that case
2 number.

3 So, yes, there was a reward. Yes, in my view, the
4 information should have been produced since the agreement to
5 make the payment apparently was reached prior to the conclusion
6 of the trial. But it is a de minimus part of the justification
7 for the reward, and I have a hard time trying to conclude that
8 it could possibly have made any difference to the results of
9 the trial in St. John and Roth.

10 Mr. Allee, would you like to address for a moment the
11 government's current position with regard to Petitioner's
12 application to examine Judge Seibel in this connection?

13 MR. ALLEE: Well, your Honor, obviously, she's a
14 judge, but, regardless of whether she's a judge, it just seems
15 there's no basis to call witnesses who have no personal
16 knowledge here, and she fits in that category. The testimony
17 from Mr. Colton was consistent with what I understood in
18 looking into this matter, which is it was Mr. Colton who put on
19 Melvin as a witness. Mr. Colton described and I think we all
20 understand --

21 MR. MARINACCIO: Your Honor, maybe I can cut this
22 short. We will withdraw the subpoena for Judge Seibel and deal
23 with the testimony of Mr. Colton.

24 THE COURT: Okay. Thank you. That resolves that
25 issue.

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1 MR. ALLEE: Must be my powerful persuasive argument.

2 THE COURT: Well done, Mr. Allee.

3 MR. MARINACCIO: That as well, that as well,
4 Mr. Allee.

5 THE COURT: All right. I am concluding that
6 Mr. Melvin has a valid Fifth Amendment right to decline to
7 testify. I am concluding that Mr. Vita has properly interposed
8 that objection to Mr. Melvin being called as a witness.

9 I will certainly grant you the opportunity,
10 Mr. Marinaccio, to order the transcript and to provide a
11 written submission on any of the issues raised in the matter.

12 Thirty days takes us to a weekend, so it would be June
13 10th, the Monday.

14 MR. MARINACCIO: Will we be able to get the
15 transcript? Okay. Let me make sure that somebody doesn't have
16 my -- your Honor, I don't want to hit this one too hard.
17 There's a possibility I'll be out of commission for a week
18 beginning Monday for a personal medical issue.

19 THE COURT: I'm sorry. This coming Monday?

20 MR. MARINACCIO: Yes, yes, this coming Monday. So can
21 we make it either the 18th or the 24th of June as opposed to
22 the 10th?

23 THE COURT: Any objection, Mr. Allee?

24 MR. ALLEE: Absolutely no objection.

25 The first two weeks of July, I'm on leave, and so if

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1 it's the 18th, I can probably get it in before then no problem.
2 If it's the 24th, it might be tight, depending on what the
3 submission is. I would ask it be either the 18th or have time
4 in July after I return.

5 THE COURT: Tell you what. Why don't we make it the
6 24th and then, Mr. Allee, give you 'till the 29th of July.

7 MR. ALLEE: Yes, your Honor. Thank you.

8 THE COURT: Is that all right?

9 MR. ALLEE: Thank you.

10 MR. MARINACCIO: So 6-24 for Petitioner's submission.

11 THE COURT: Yes.

12 MR. MARINACCIO: 7-29 for any reply.

13 THE COURT: Well, for the opposition. Your reply then
14 August 9th. Is that all right?

15 MR. MARINACCIO: 8-9 for reply.

16 THE COURT: Yes.

17 MR. MARINACCIO: Fine.

18 THE COURT: Let's schedule -- can we plan to come
19 back, then, how's Friday, September 13th? Friday the 13th?
20 It's an auspicious day. At 10 a.m.

21 MR. MARINACCIO: Friday the 13th at 10 a.m.

22 THE COURT: All right. Thank you very much. We are
23 adjourned.

24 MR. MARINACCIO: Thank you.

25 - - - -